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Plaintiff Pro Per

FILED
BY: [signature]
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VIRLYNN TINNELL
SUPERIOR COURT CLERK

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

NANCY KNIGHT,

Plaintiff,

vs.

GLEN LUDWIG AND PEARL LUDWIG, TRUSTEES OF THE LUDWIG FAMILY TRUST; FAIRWAY CONSTRUCTORS, INC.; MEHDI AZARMI; JAMES B. ROBERTS AND DONNA M. ROBERTS, HUSBAND AND WIFE; JOHN DOES 1-10; JANE DOES 1-10; ABC CORPORATIONS 1-10; AND XYZ PARTNERSHIPS 1-10.

Defendants.

CASE NO.: **CV 2018-04003**

MOTION TO COMPEL DEFENDANTS TO AMEND THEIR REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Assigned to Hon. Judge Jantzen)

COMES NOW Nancy Knight, Plaintiff Pro Per, pleading for the Court to Compel Defendants to Amend their Reply dated January 13, 2020 for accuracy and honesty. Tract 4076-D is not a "legal mirror image" of Tract 4163. Arizona Law Title 9 defies Defendants' Preliminary Plat claims. The CC&Rs have not been abandoned and Arizona Law supports Plaintiff's position. Defendant's have failed to inform the Plaintiff of what part of Rule 56(c)(3) she did not follow - hindering her ability to correct any errors and/or omissions. Affiant Exhibits and claims are not accurate - opinions are inappropriate. 75% of the lots are not in violation of the CC&Rs.

B8015CV201804003

MEMORANDUM OF POINTS AND AUTHORITIES

Tract 4163 is comprised of lots created from Parcel VV of Tract 4076-B and since the CC&Rs run with the land, Tract 4163 is subject to Tract 4076-B CC&Rs. Tract 4163 is separate and distinct from Tract 4076-D that is comprised of 12 lots with its own Declaration of Covenants, Conditions, and Restrictions (hereinafter "CC&Rs"). **Exhibit A** – Declaration of CC&Rs for Tract 4076-D.

Arizona Law, Title 9 supports the Plaintiff's right to prosecute violations in Tract 4076-A in addition to her adjudicated right to prosecute violations in Tract 4076-B. Desert Lakes Golf Course and Estates Subdivision Tract 4076 was created by the 1988 approved preliminary plat and all property owners should be granted rights to prosecute violations in the Subdivision of this Master Planned Community and not just within a "said tract".

> Arizona Laws Title 9, Chapter 4, Article 6
> 9-463 Definitions
> 6. "Plat" means a map of a subdivision:
> (a) "Preliminary plat" means a preliminary map, including supporting data, indicating a proposed subdivision design prepared in accordance with the provisions of this article and those of any local applicable ordinance.
> (b) "Final plat" means a map of all or part of a subdivision essentially conforming to an approved preliminary plat, prepared in accordance with the provision of this article, those of any local applicable ordinance and other state statute. (Emphasis supplied)
> (c) "Recorded plat" means a final plat bearing all of the certificates of approval required by this article, any local applicable ordinance and other state statute.
>
> 10. "Subdivision" means any land or portion thereof subject to the provisions of this article as provided in Title 9-463.02.
>
> Maricopa County Subdivision Regulations: Definitions

> 30. Plan, Development Master: A preliminary master plan for the development of a community or other large land area, the platting of which is expected to be undertaken in progressive stages. A Development Master Plan shall be subject to Commission and Board Approval. (Emphasis supplied)

Defendants have failed to cite, per line 28 on page 1 or their Reply, the law in the State of Arizona that they contend supports their position that there has been an abandonment of the CC&R/covenants. To the contrary, the case of *Cundiff et al v Cox* fully explores CC&R abandonment and the CC&R non-waiver provisions in a closely parallel matter to Plaintiff's Complaint. This case was decided by the Arizona Appeals Court in CA-CV 15-0371 (2017). https://casetext.com/case/cundiff-v-cox. **Exhibit B** – Copy of the decision (23 pages, first 4 pages not a part of case history and decision).

> In *Continental Oil v Fennemore,* Supreme Court of Arizona, May 27, 1931 38 Ariz. 277 (Ariz. 1931), the supreme court wrote:
> "The policy of the courts of this state should be to protect the home owners who have purchased lots relying upon, and have maintained and abided by, restrictions, from the invasion of those who attempt to break down these guaranties of home enjoyment under the claim of business necessities."
>
> "Words in a restrictive covenant must be given their ordinary meaning, and the use of the words within a restrictive covenant gives strong evidence of the intended meaning". *Duffy v. Sunburst Farms E. Mut. Water & Agric. Co.*, 124 Ariz. 413, 416, 604 P.2d 1124, 1127 (1979). "Unambiguous restrictive covenants are generally enforced according to their terms". Id. at 417, 604 P.2d at 1128.
>
> In Powell v Washburn, 211 Ariz. 553, 125 P.3d 373 (2006), the Supreme Court unanimously vacated the decision of the court of appeals and affirmed the trial court's judgment. In so holding, the court adopted the approach of the Restatement (Third) of Property: Servitudes ("Restatement"), which provides that [a] servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created.

Desert Lakes' CC&R restrictions have not been disregarded. Plaintiff enforced her property's fence design in accordance with the CC&Rs and restored her CC&R protected views of the golf course and surrounding area in CV 2016 04026. Defendants continued claim that the CC&Rs have not been enforced and therefore have been abandoned has been clarified for Mr. Oehler. The Arizona State Bar Association confirmed Plaintiff's case CV 2016 04026 was a CC&R matter. The Plaintiff's claim that the mediation settlement was proof of enforcement is further supported by this letter from the State Bar Assoc. **Exhibit C** – Letter from the Arizona State Bar Association regarding Plaintiff's prior CC&R enforcement case.

Plaintiff also seeks an explanation of what part of A.R.C.P. 56 was not followed. The Court's Judicial Assistant was copied on an email to Mr. Oehler, as she has been copied in the past for procedural issues. In the past, Ms. Lecher was able to intervene when Plaintiff informed Mr. Oehler by email that his Motion for Summary Judgment was not posted to the online Case History. Ms. Lecher explained to the Plaintiff by email that there was a glitch in the system. Apparently, the online Case History cannot be relied upon to track motions, rulings, etc. that are filed with the Court. In the current dispute of not following Rule 56, Ms. Lecher was not able, or not inclined, to respond to Plaintiff with what part of Rule 56 she had not followed. **Exhibit D** – Jan 31, 2020 email to Mr. Oehler and copied to the Court's Judicial Assistant Lecher.

Plaintiff followed A.R.C.P. Rule 56(c)(3) as found online and also as cited in Rule 129 as posted by Westlaw at https://govt.westlaw.com/azrules as follows: Due to similar

but expanded verbiage in the two online Rules, Plaintiff did her best to comply with all cited language. Plaintiff does not understand what was wrong and will need to file a Motion for Court Clarification and Leave to Amend her Response for Errors and/or Omissions.

> "Rule 56. Summary Judgment, Arizona Revised Statutes Annotated, Rules of Civil Procedure for the Superior Courts of Arizona". (2) "*Opposition and Reply.* An opposing party must file its response and any supporting materials within 30 days after the motion is served.
>
> From Rule 129: "Your response must be filed within thirty (30) days from the date this motion was served. [ARCP 56(c)]
> Rule 56 (c) regarding content of a Response
> Your response to the motion must include:
> (1) A statement of facts, with each of the facts stated separately in numbered paragraphs or numbered sentences. A statement of facts must be supported by affidavits, exhibits, or other material that establishes each fact by admissible evidence. It is not enough for you to simply deny facts. You must present evidence that shows a genuine dispute of the facts.
> (2) A memorandum of law that summarizes the issues, provides legal authority in support of your position, and describes why the judge should deny the motion."
>
> 56 (c)(3) *Supporting and Opposing Statements of Fact.*
> (B) Opposing Party's Statement. An opposing party must file a statement in the form prescribed by Rule 56(c)(3)(A), specifying: (i) the numbered paragraphs in the moving party's statement that are disputed; and (ii) those facts that establish a genuine dispute or otherwise preclude summary judgment in favor of the moving party.

The Plaintiff complied with supporting materials as Exhibits as cited for Rule 56 under the ARCP for Rule 129 in (1) above and with genuine material facts for trial as supported by Exhibits as evidence. (Emphasis supplied). Plaintiff responded to the moving party's numbered paragraphs. Plaintiff established a genuine dispute to preclude summary judgment in favor of the moving party. Plaintiff contends that a preponderance

of evidence makes it legally impossible to grant the Defendants their dispositive motion in this matter.

> Regarding Rule 56 and Affidavits:
> **e.** Affidavits in support of or opposing a summary judgment motion must be based on personal knowledge and must contain only facts that would be admissible as evidence at trial under the Arizona Rules of Evidence.
>
> If a party opposing a summary judgment motion cannot obtain affidavits or exhibits within the time allowed for filing a response to the motion, the opposing party may ask the court for more time to respond by stating the reasons why additional time is required. The judge may impose a penalty on a party who submits an affidavit in bad faith, or who files an affidavit only to delay the lawsuit. [ARCP 56(e)-(g)]

Mr. Kukreja's has changed dates on the notorized signature page that was originally signed by the Notary in September 2019. That month was struck, changed to December, struck again, and changed to November. Mr. Kukreja's mental competency comes into question as a reliable source of personal knowledge considering his claim of purchasing 183 lots in Desert Lakes when in fact some of those lots were actually purchased in the adjacent subdivision of Los Lagos in their Tract 4096-A. The Defendants are suspect of submitting an affidavit in bad faith.

The most reliable part of Mr. Kukreja's exhibits supported the Plaintiff's claim that her Parcel VV was not abandoned as has been claimed repeatedly and in bad faith by the Defendants and now by Affiant Stephan as well with his claim that "Tract 4163 has no CC&Rs of any type attributable to that subdivision". What Mr. Stephan leads the Court to believe is that the CC&Rs for Tract 4076-D are substantially identical to the CC&Rs utilized in subdivision Tract 4076-B. Actually, all Desert Lakes Golf Course and

Estates hyphenated Tract 4076 numbers have CC&Rs that are substantially identical to the original Phase I Tract 4076-A Declaration of CC&Rs.

Arizona Law Title 9 does not define Tracts. Arizona Law defined the Preliminary Plat that created the Desert Lakes Subdivision Tract 4076 as an approved plat and it defines Final Plats as the recorded plats.

Approximately 26 lots purchased by Mr. Kukreja's company around 1998 in Tract 4076-B is not a significant number. Tract 4076-B is comprised of 223 lots with 21% of the lots still vacant in 2016 (47 of 223) when Defendant Azarmi attempted to change the setbacks on all lots in Desert Lakes through BOS Resolutions 2016-125 and 2016-126. Data is based on an Excel Spreadsheet provided by Mohave County Development Services as has been made a part of the record in whole or in part. Forty-seven vacant lots in Tract 4076-B alone is a significant number if the CC&Rs are not enforced and the intent of Desert Lakes Development L.P. is abandoned in favor of the Defendants' Motion for Summary Judgment.

Regarding signs, it is highly doubtful that any of the Affiants can accurately recall where they saw signs, what the signs said, or the type of sign materials they were made of back in the mid- to late 90s. If they were "For Sale" signs on model homes or completed homes, the CC&Rs allow this. It is advertising a business on undeveloped lots that is not allowed - nor is it a protected right by Statute 33-441 - nor is a protected right in accordance with the Mohave County Zoning Ordinance Section 42.

Mr. McKee's admitting he built homes in violation of the CC&Rs is irrelevant.

As a contractor, he is not a party to the CC&Rs. The owners of the lots on which he built homes are the responsible parties. Further, any mention of the Architectural Committee in these Affidavits is again the Defendants being suspect of submitting Affidavits in bad faith when it is a part of the record that the Architectural Committee was intentionally designed to be a short-term assignment of one year from the issuance of the public report.

Defendant's Affiants' Statements are suspect of hearsay risks that cannot be, or are not, verified with actual exhibits, addresses, plot plans, or other supporting documents. The affiants are bystanders making statements based on memory recall from at least ten years ago. Hearsay risks associated with out-of-court statements includes: 1) Risk of Misperception: Risk not only a function of sensory capacity but of physical circumstance and of mental capacity and psychological condition. 2) Risk of fault memory. Cross-examination may be very useful in establishing, eliminating or reducing uncertainties however this ability is not available with hearsay. 3) Risk of Mistatement such as may someday be a Mr. Green's window defense after agreeing to be an Affiant who admits installing windows on golf course homes without using safety glass (tempered glass as is required in compliance with the CC&Rs) and that installation resulted in a child being seriously injured after a golf ball breaks and shatters the glass window. 4) Risk of Distortion either consciously or subconsciously.

Defendants' Affiant statements do not reflect an abandonment of the CC&Rs. Any excuse by any affiant that they followed County Zoning Ordinances for a ten foot setback is irrelevant. As stated in Tract 4076-B CC&Rs, paragraph 21. "In the event that any of

the provisions of this Declaration conflict with any other of the sections herein, or with any applicable zoning ordinance, the more restrictive shall govern. (Emphasis supplied) Again, the Defendants are suspect of submitting Affidavits in bad faith.

Mr. Morse's Exhibit C is not a photo of the Knight rear yard. It is a photo of Mr. Edwards' Rear Yard fence that also has protective chain link ball netting barrier and steel rails painted white. Mr. Morse's Exhibit D is the Plaintiff's chain link ball netting as viewed from the Edwards' rear yard showing the bent links from the force that is exerted on metal fabric from golf balls. This is the reason chain link fabric is more protective than any other type of fabric that can deteriorate and lose the safety purpose for which is was intended. Someone in 2005 must have known that metal mesh is better than nylon netting when these protective barriers were erected on our lots in Desert Lakes. Mr. Morse contributed nothing of value for the jury to consider in this matter. Any reference to the Plaintiff's side yard or rear yard setbacks or ball netting made of wire mesh is not a part of this case. Golf ball protective barriers are not fences. A lack of enforcement in the past is a non-issue due to the non-waiver clause in the CC&Rs.

Plaintiff's boundary fences are not chain link fences. The color of steel rails in boundary fences is not a detriment to the design of the master planned golf course community and in the absence of the Architectural Committee minutes no one can be certain that a variance on the steel rail color was not approved.

Plaintiff did not say the master planned community has any Arizona Rooms. Arizona Rooms can be created from patio covers by installing three sides to form

additional living space. This is the risk of causing a further taking of golf course views with ten foot setbacks when adjacent homes have a twenty foot setback. For this reason, ten foot patio setback roof protrusions may need to be cut away as a remedy for the protected views of adjacent lot owners just as Plaintiff had to cut away modifications to her side yard fence and the neighbor's rear yard fence. Remedies are available for compliance with the CC&Rs.

In dispute is the Defendants' claim that 75% of the subdivision's homes have been built in contradiction of the CC&Rs. This is not a plausible claim since the Subdivision is Tract 4076 comprised of 221 lots in Tract 4076-A, 209 lots in Tract 4076-B, 208 lots in Tract 4076-C, 12 lots in Tract 4076-D, and 27 lots in Tract 4132. Among those 677 lots, 63 lots were vacant in Tract 4076-A, 46 lots were vacant in Tract 4076-B, 38 lots were vacant in Tract 4076-C, 2 lots were vacant in Tract 4076-D, and none were vacant in Tract 4163. A total of 677 parcels with 149 lots still vacant is 22% vacant with no violations with the exception of the Defendants advertising signs. It is highly unlikely that all but three percent of the developed properties have violations that have created such a detrimental impact on the master planned community that any reasonable person would consider the CC&Rs abandoned.

Mr. Stephan is under the false impression that no CC&Rs are associated with Tract 4163. Title companies cite the location of Tract 4163 CC&Rs in Book 1641, Page 895 as has already been submitted as part of the record for the Plaintiff's home.

Mr. Patch's affidavit regarding Tract 4076-D is irrelevant to this case at this time.

Plaintiff finds Ms. Pettit's claim of posting real estate signs on undeveloped lots since the 90s as a violation of her client's responsibility to abide in the CC&Rs. As a professional, she should have made those clients aware of the violation. Again, greed for the sale of the lots is an apparent motivator. Opinions as stated by Ms. Pettit on line 16 is improper for an Affidavit. Ms. Pettit's company provides Development Services for Fairway Constructors per her US Southwest logo on advertising signs in Desert Lakes. The Arizona Department of Real Estate confirmed this business advertising is not protected by Statute 33-441 and stated "the sign does not state the property is for sale or lease".

Plaintiff follows Rule 11 regarding her signature on pleadings, motions, and other documents in lieu of an affidavit.

> Rule 11 (b) Representations to the Court. By signing a pleading, motion, or other document, the attorney or party certifies that to the best of the person's knowledge, information, and belief formed after reasonable inquiry: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law. (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

The Court has an opportunity to right a technical glitch in the language and interpretation of the individual "said tract" CC&Rs from the Desert Lakes Golf Course and Estates "Subdivision" Tract 4076 as a whole thereby restoring the Developers

intended rights to prosecution by any person in the subdivision as a whole. Abandonment of the CC&Rs in Tract 4076-B is not true - nor was it claimed by Mr. Oehler in 2016 - nor was it claimed in 2018 during the Defendant's first dispositive motion over two years ago. This dispositive motion is harassment and dilatory.

> Paragraph 20: "No failure of the Trustee or any other person or party to enforce any of the restrictions, covenants or conditions contained herein shall, in any event, be construed or held to be a waiver thereof or consent to any further or succeeding breach or violation thereof."

Ripeness, the Arizona Constitution, and Defendant's claim of their metal advertising signage is one and the same as a for sale sign that is protected by statute 33-441. According to the Arizona Constitution, the Court has powers to strike down any official act of the governor or other public official. Accordingly, whenever a statute, rule, ordinance, or governmental act is challenged on the ground that it conflicts with the state or federal constitution, the courts have the authority to declare the law or act "unconstitutional" (and therefore unenforceable). Pages 120-121, Chapter Six, "Understanding The Arizona Constitution" by Toni McClory. Plaintiff believes that any sign on undeveloped lots that becomes wind twisted and uprooted from the ground poses a risk to persons and property. The defendant's signs are not for sale signs and yet the Defendants have been able to avoid taking these dilapidated signs and sign riders down using A.R.S. § 33–441 as their cover. We should not have to wait for a jury to decide the issue of fact.

The Mohave County Ordinance on Sign definitions begins in Section 42 B on page 182. Exhibit E – Pertinent 8 pages from the Sign Ordinance (Emphasis supplied by encircling, underscoring, and written notes.)

Regarding the purpose of removal, the sign on Wishing Well has now lost its sign and only the sign rider (structure) is left standing on the unimproved lot. As stated, and shown in photographic evidence, these signs are a hazard to persons and property. These signs sit for years on vacant property with no maintenance and become a risk to persons and property when the sheet metal signs or sign riders come apart due to rust and wind twisting.

The County Deputy Attorney and Development Services personnel have taken the position that Fairway Constructors' advertising is Real Estate signage. Attorney Robert Taylor stated that for a definition of "Real Estate or Property for Sale, Rent, or Lease Sign", please review Section 42 B. of the Mohave County Zoning Ordinance. That provision defines such sign as "any sign pertaining to the sale, lease or rental of lands or buildings." Mr. Taylor contends that it is Development Services reasonable interpretation and application of the ordinance that a sign indicating that a lot is available and will be built to suit on is a "real estate sign". The problem is that no such language exists in the County Ordinance. Supra exhibit E above (page 186).

CONCLUSION

Plaintiff pleads with the Court to use its power to strike down any interpretation by the government that this sign is other than off-premises advertising.

Plaintiff pleads with the Court to Compel Defendants to correct their Reply to Plaintiff's Response and to also submit revised Affidavits to prove Defendants were not acting in bad faith with inappropriate statements, exhibits, and opinions.

Plaintiff pleads for denial of Defendant's attorney fees in accordance with the provisions of §12-349 and §12-350 or any other statute regarding attorney fees.

RESPECTFULLY SUBMITTED this 24th day of February, 2020.

NANCY KNIGHT
Plaintiff Pro Per

COPY of the foregoing emailed on this 24th day of February, 2020 to:

djolaw@frontiernet.net

Attorney for Defendants
Daniel J. Oehler, Esq.
Law Offices of Daniel J. Oehler
2001 Highway 95, Suite 15
Bullhead City, Arizona 86442

Exhibit A

Declaration of CC&Rs for Tract 4076-D.

Exhibit A

68 Holland West
PO Box 4699
Bullhead City Az 86442

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS

FOR

DESERT LAKES GOLF COURSE & ESTATES 4076-D INDEXED

MOHAVE COUNTY, ARIZONA

#90- 73717 BK 1808 PG 509
OFFICIAL RECORDS OF MOHAVE COUNTY, AZ.
JOAN McCALL, MOHAVE COUNTY RECORDER
10/19/90 9:30 A.M. PAGE 1 OF 6
HOLLAND WEST
RECORDING FEE 11.00

KNOW ALL MEN BY THESE PRESENTS:

THIS DECLARATION made and entered into this 18th day of April, 1990, by WesTITLE CORPORATION, an Arizona corporation, as Trustee, under Trust No. 1033 , hereinafter designated "The Declarant" which holds the lands hereinafter referred to as the Trustee for the benefit of DESERT LAKES DEVELOPMENT L. P., a Delaware Limited Partnership.

WHEREAS, the Declarant is the owner of DESERT LAKES GOLF COURSE & ESTATES, TRACT 4076-D, County of Mohave, State of Arizona, as per plat thereof recorded on the 17 day of October , 1990 at Fee No. 90-73298 , and

WHEREAS, the Declarant intends to sell, dispose of or convey from time to time all or a portion thereof the lots in said Tract 4076-D and desires to subject the same to certain protective reservations, covenants, conditions and restrictions between it and the acquirers and/or users of the lots in said tract.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS that the Declarant hereby certifies and declares that it has established and does hereby establish a general plan for the protection, maintenance, development and improvement of said tract, and that this declaration is designed for the mutual benefit of the lots in said tract and Declarant has fixed and does hereby fix the protective conditions upon and subject to which all lots, parcels and portions of said tract and all interest therein shall be held, leased or sold and/or conveyed by the owners or users thereof, each and all of which is and are for the mutual benefit of the lots in said tract and of each owner thereof, and shall run with the land, and shall inure to and pass with each lot and parcel of land in said tract, and shall apply to and bind the respective successors in interest thereof, and further are and each thereof is imposed upon each and every lot, parcel or individual portion of said tract as a mutual equitable servitude in favor of each and every other lot, parcel or individual portion of land therein as the dominant tenement.

Every conveyance of any of said property or portion thereof in Tract 4076-D, shall be and is subject to the said Covenants, Conditions and Restrictions as follows:

ARTICLE I

COMMITTEE OF ARCHITECTURE

Declarant shall appoint a Committee of Architecture, hereinafter sometimes called "Committee", consisting of three (3) persons. Declarant shall have the further power to create and fill vacancies on the Committee. At such time that ninety percent (90%) of the lots within the subdivision have been sold by Declarant, or within one year of the issuance of the original public report, whichever occurs first, the owners of such lots upon request to the Committee may elect three members therefrom to consist of and serve on the Committee of Architecture. Nothing herein contained shall prevent Declarant from assigning all rights, duties and obligations of the Architecture Committee

to a corporation organized and formed for and whose members consist of the owners of lots within this subdivision.

Notwithstanding anything hereinbefore stated, architectural review and control shall be vested in the initial Architecture Committee composed of ANGELO RINALDI, FRANK PASSANTINO AND STERLING VARNER until such time as ninety percent (90%) of the lots in Tract 4076-D have been sold by Declarant, or within one year of the issuance of the original public report, whichever occurs first. The initial address of said Committee shall be P. O. Box 8858 Fort Mojave, Arizona 86427. Any and all vacancies during such period shall be filled on designation by DESERT LAKES DEVELOPMENT L. P.

No building, porch, fence, patio, ramada, awning or other structure shall be erected, altered, added to, placed upon or permitted to remain upon the lots in Tract 4076-D, or any part of any such lot, until and unless the plan showing floor areas, external designs and the ground location of the intended structure, along with a plot plan and front/rear landscaping plan and a fee in the amount set by the Committee but not less than TEN DOLLARS AND NO/100 ($10.00) nor more than ONE HUNDRED DOLLARS AND NO/100 ($100.00) have been first delivered to and approved in writing by the Committee of Architecture.

It shall be the general purpose of this Committee to provide for maintenance of a high standard of architecture and construction in such manner as to enhance the aesthetic properties and structural soundness of the developed subdivision.

The Committee shall be guided by, and, except when in their sole discretion good planning would dictate to the contrary, controlled by this Declaration. Notwithstanding any other provision of this Declaration, it shall remain the prerogative within the jurisdiction of the Committee to review applications and grant approvals for exceptions or variances to this Declaration. Variations from these requirements and in general other forms of deviations from these restrictions imposed by this Declaration may be made when and only when such exceptions, variances and deviations do not in any way detract from the appearance of the premises, and are not in any way detrimental to the public welfare or to the property of other persons located within the tract, all in the sole opinion of the Committee.

Said Committee, in order to carry out its duties, may adopt reasonable rules and regulations for the conduct of its proceedings and may fix the time and place for its regular meetings and for such extraordinary meetings as may be necessary, and shall keep written minutes of its meetings, which shall be open for inspection to any lot owners upon the consent of any one of the members of said Committee. Said Committee shall by a majority vote elect one of its members as chairman and one of its members as secretary and the duties of such chairman and secretary appertain to such offices. Any and all rules or regulations adopted by said Committee regulating its procedure may be changed by said Committee from time to time by a majority vote and none of said rules and regulations shall be deemed to be any part or portion of this Declaration or the conditions herein contained.

The Committee shall determine whether the conditions contained in this Declaration are being complied with.

ARTICLE II

LAND USE

A. General

1. All buildings erected upon the lots within the subdivision shall be of new construction. All such buildings must

be completed within twelve (12) months from the commencement of construction. Mobile homes and all structures built, constructed or prefabricated off the premises are expressly prohibited, including but not limited to modular or manufactured structures and existing structures.

2. No noxious or offensive activities shall be carried on upon any lot, nor shall anything be done thereon which may be or may become an annoyance or nuisance to the neighborhood.

3. No lot shall be conveyed or subdivided smaller than that shown or delineated upon the original plat map, but nothing herein contained shall be so construed as to prevent the use of one lot and all or a fraction of an adjoining lot as one building site, after which time such whole lot and adjacent part of the other lot shall be considered as one lot for the purposes of these restrictions.

4. All buildings on lots not adjacent to the golf course being Lot 81, Block F shall have a minimum of one thousand four hundred (1,400) square feet of living space, exclusive of garages, porches, patios and basements. Buildings on all other lots, being those lots adjacent to the golf course, in Tract 4076-D shall have a minimum of one thousand six hundred (1,600) square feet of living space, exclusive of garages, porches, patios and basements. No construction shed, basement, garage, tent, shack, travel trailer, recreational vehicle, camper or other temporary structure shall at any time be used as a residence.

5. All buildings shall have: (i) a maximum building height of Thirty (30) feet from the surface of the lot to the peak of the highest projection thereof; (ii) no more than two stories; (iii) no exposed radio, radio-telephone, television or microwave receiving or transmitting antennas, masts or dishes; (iv) no airconditioning unit on roofs; (v) a closed garage with interior dimensions of no less than twenty (20) feet; (vi) on any roof visible from ground level at any point within Tract 4076-D as its exposed visible surface, clay, concrete or ceramic tile, slate, or equal as may be approved by the Committee on Architecture; (vii) tempered glass in all windows facing fairways and driving range lakes.

6. All buildings and projections thereof on lots not adjacent to the golf course being Lot 81, Block F, shall be constructed not less than twenty feet (20') back from the front and rear property lines and five feet (5') from side property lines. All buildings and projections thereof on Lots adjacent to the golf course being Lots 75, 76, 77, 78, 79, 80, 82, 83, 84, 85, 86, Block F, shall be constructed not less than twenty feet (20') from the front and rear property lines and five feet (5') from the side property lines.

7. Fences and walls shall not exceed six (6) feet in height and shall not be constructed in the street set back area (being twenty feet (20') from the front property line). Fences and walls visible from the street must be decorative and shall not be of wire, chain link, or wood or topped with barbed wire, except that on all lots adjacent to fairway lots the rear fences shall be of wrought iron construction for a total fence height of five feet (5') black in color which shall continue along the side lot line for a distance of fifteen feet (15'). Access to the golf course from lots adjacent to the golf course is prohibited.

8. No individual water supply system (private well) shall be permitted on any lot in the subdivision.

9. No animals, livestock, birds or poultry of any kind shall be raised, bred or kept on any lot, provided, however, that personal pets such as dogs, cats or other household pets may be kept, but shall be fenced or leashed at all times.

10. No lot shall be used or allowed to become in such condition as to depreciate the value of adjacent property. No weeds, underbrush, unsightly growth, refuse piles, junk piles or other unsightly objects shall be permitted to be placed or to remain upon said lot. In the event of any owner not complying with the above provisions, the corporation whose members are the lot owners, Declarant, or its successor and assigns, shall have the right to enter upon the land and remove the offending objects at the expense of the owner, who shall repay the same upon demand, and such entry shall not be deemed a trespass.

11. No sign, advertisement, billboard or advertising structure of any kind shall be erected or allowed on any of the unimproved lots, and no signs shall be erected or allowed to remain on any lots, improved or otherwise, provided, however, that an owner may place on his improved lot "For Sale" signs, "For Lease" signs or "For Rent" signs so long as they are of reasonable dimensions.

12. All dwellings shall install water flush toilets, and all bathrooms, toilets or sanitary conveniences shall be inside the buildings constructed on said property. All bathrooms, toilets or sanitary conveniences shall be connected to central sewer. Septic tanks, cesspools and other individual sewage systems are expressly prohibited. Water and energy conservation devices including but not limited to toilets, shower heads, water heaters, and insulation shall be used whenever feasible. Low water use vegetation shall be used whenever possible in landscaping.

13. The storage of inoperative, damaged or junk motor vehicles and appliances and of tools, landscaping instruments, household effects, machinery or machinery parts, boats, trailers, empty or filled containers, boxes or bags, trash, materials, including used construction materials, or other items that shall in appearance detract from the aesthetic values of the property shall be so placed and stored to be concealed from the view of the public right-of-way and adjacent landowners. Trash for collection may be placed at the street right-of-way line on regular collection days for a period not to exceed twelve hours prior to pickup.

14. Under no circumstances shall any owner of any lot or parcel of land be permitted to deliberately alter the topographic conditions of his lot or parcel of land in any way that would permit additional quantities of water from any source other than what nature originally intended to flow from his property onto any adjoining property or public right-of-way, or redirect the flow.

15. No person shall use any premise in any land use area, which is designed, arranged or intended to be occupied or used for any purpose other than expressly permitted in this Declaration as set forth herein and in part "B" hereof. Multiple family dwellings, including apartments, condominiums, town houses and patio homes are expressly forbidden.

16. None of the premises shall be used for other than residential purposes or for any of the following: storage yard; circuses; carnivals; manufacturing or industrial purposes; produce packing; slaughtering or eviscerating of animals, fowl, fish or other creatures; abattoirs or fat rendering; livery stables, kennels or horse or cattle or other livestock pens or boarding; cotton ginning; milling; rock crushing; or any use or purpose whatsoever which shall increase the fire hazard to any other of the said structures located upon the premises or which shall generate, give off, discharge or emit any obnoxious or excessive odors, fumes, gasses, noises, vibrations or glare or in

any manner constitute a health menace or public or private nuisance to the detriment of the owner or occupant of any structure located within the premises or violate any applicable law.

17. These covenants, restrictions, reservations and conditions shall run with the land and shall be binding upon all parties and all persons claiming under them for a period of twenty-five (25) years from the date hereof. Thereafter, they shall be deemed to have been renewed for successive terms of ten (10) years, unless revoked or amended by an instrument in writing, executed and acknowledged by the then owners of not less than seventy-five percent (75%) of the lots on all of the property then subject to these conditions. Notwithstanding anything herein to the contrary, prior to the Declarant having sold a lot that is subject to this instrument, Declarant may make any reasonable, necessary or convenient amendments in these restrictions and said amendments shall supercede or add to the provisions set forth in this instrument from and after the date the duly executed document setting forth such amendment is recorded in the Mohave County Recorder's Office.

18. Invalidation of any of the restrictions, covenants or conditions above by judgment or court order shall in no way affect any of the other provisions hereof, which shall remain in full force and effect.

19. If there shall be a violation or threatened or attempted violation of any of the foregoing covenants, conditions or restrictions it shall be lawful for Declarant, its successors or assigns, the corporation whose members are the lot owners or any person or persons owning real property located within the subdivision to prosecute proceedings at law or in equity against all persons violating or attempting to or threatening to violate any such covenants, restrictions or conditions and prevent such violating party from so doing or to recover damages or other dues for such violations. In addition to any other relief obtained from a court of competent jurisdiction, the prevailing party may recover a reasonable attorney fee as set by the court. No failure of the Trustee or any other person or party to enforce any of the restrictions, covenants or conditions contained herein shall, in any event, be construed or held to be a waiver thereof or consent to any further or succeeding breach or violation thereof. The violation of any of the restrictions, covenants or conditions as set forth herein, or any one or more of them, shall not affect the lien of any mortgage or deed of trust now on record, or which may hereafter be placed on record.

20. In the event that any of the provisions of this Declaration conflict with any other of the sections herein, or with any applicable zoning ordinance, the more restrictive shall govern. The invalidity of any one or more phrases, sentences, clauses, paragraphs or sections hereof shall not affect the remaining portions of this instrument or any part thereof, all of which are inserted conditionally on their being held valid in law and in the event that one or more of the phrases, sentences, clauses, paragraphs or sections contained therein should be invalid or should operate to render this agreement invalid, this agreement shall be construed as if such invalid phrase or phrases, sentence or sentences, clause or clauses, paragraph or paragraphs, or section or sections had not been inserted. In the event that any provision or provisions of this instrument appear to be violative of the Rule against Perpetuities, such provision or provisions shall be construed as being void and of no effect as of twenty-one (21) years after the death of the last partners of Desert Lakes Development, or twenty-one (21) years after the death of the last survivor of all of said incorporators children or grandchildren who shall be living at the time this instrument is executed, whichever is the later.

21. The singular wherever used herein shall be construed to mean the plural when applicable, and the necessary grammatical changes required to make the provisions hereof apply either to corporations or individuals, men or women, shall in all cases be assumed as though in each case fully expressed.

B(1). Special Development Residential
SD-R Single Family Residential, Mobile Homes Prohibited
Land Use Regulations.

Uses Permitted:

Single Family dwelling and accessory structures and uses normally incidental to single family residences, MOBILE HOMES, MANUFACTURED HOMES AND PREFABRICATED HOMES PROHIBITED.

WesTITLE CORPORATION,
as Trustee

By [signature]

Title: Trust Officer

DESERT LAKES DEVELOPMENT L.P.
a Delaware Limited Partnership

By [signature]

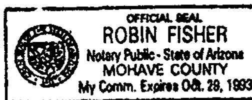
STATE OF ARIZONA)
) SS
COUNTY OF MOHAVE)

On this, the 12 day of September, 1990, before me the undersigned officer, personally appeared ________________, who acknowledged himself to be a Trust Officer of WesTITLE CORPORATION, an Arizona corporation, and that he, as such officer being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself as Trust Officer.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

My Commission Expires: ________________

[signature]
Notary Public


OFFICIAL SEAL
ROBIN FISHER
Notary Public - State of Arizona
MOHAVE COUNTY
My Comm. Expires Oct. 29, 1993

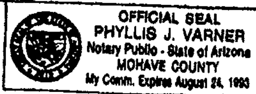
STATE OF ARIZONA)
) SS
COUNTY OF MOHAVE)

On this, the 6th day of December, 1989, before me, the undersigned officer, personally appeared FRANK PASSANTINO, Secretary of LAGO ENTERPRISES, INC., who acknowledged himself to be a General Partner in DESERT LAKES DEVELOPMENT, a Delaware Limited Partnership, and that he, as such Incorporator being authorized so do do, executed the foregoing instrument for the purposes therein contained, by signing the name of the Corporation by himself as a Incorporator.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

My Commission Expires:

[signature]
Notary Public


OFFICIAL SEAL
PHYLLIS J. VARNER
Notary Public - State of Arizona
MOHAVE COUNTY
My Comm. Expires August 24, 1993

BELLA/04/18/90

Exhibit B

Cundiff et al v Cox: Copy of the decision.

(23 pages, first 4 pages not a part of case history and decision).

Exhibit B

DIVISION ONE
FILED: 06/21/2017
AMY M. WOOD,
CLERK
BY: DN

IN THE

COURT OF APPEALS

STATE OF ARIZONA
DIVISION ONE

JOHN B. CUNDIFF and BARBARA C. CUNDIFF, husband and wife; ELIZABETH NASH, a married woman dealing with her separate property; KENNETH PAGE and KATHRYN PAGE, as Trustee of the Kenneth Page and Catherine Page Trust; JAMES VARILEK, as Joined Plaintiff property owner, Plaintiffs/Appellees, v. DONALD COX and CATHERINE COX, husband and wife, Defendants/Appellants.	Court of Appeals Division One No. 1 CA-CV 15-0371 Yavapai County Superior Court No. P1300CV2003-0399

FILED
1:15 O'Clock P.M.
JUN 26 2017
DONNA McQUALITY, Clerk
By: T. FENTON

w/o

MANDATE

TO: The Yavapai County Superior Court and the Honorable David L Mackey, Judge, in relation to Cause No. CV 2003-0399.

This cause was brought before Division One of the Arizona Court of Appeals in the manner prescribed by law. This Court rendered its MEMORANDUM DECISION and it was filed on November 3, 2016.

The motion for reconsideration was denied and notice thereof was given on December 20, 2016. A petition for review was filed. The record was forwarded to the Arizona Supreme Court. By order, dated May 24, 2017, the Arizona Supreme Court denied the petition for review. Arizona Supreme Court No. CV-17-0006-PR.

NOW, THEREFORE, YOU ARE COMMANDED to conduct such proceedings as required to comply with the MEMORANDUM DECISION of this court; a copy of which is attached hereto.

COSTS $443.00 ATTORNEY'S FEES $26,727.75 (Appellees Cundiff)
COSTS $164.00 ATTORNEY'S FEES $25,000.00 (Appellee Varilek)

I, Amy M. Wood, Clerk of the Court of Appeals, Division One, hereby certify the attachment to be a full and accurate copy of the MEMORANDUM DECISION filed in this cause on November 3, 2016.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of the Arizona Court of Appeals, Division One, on June 21, 2017.

AMY M. WOOD, CLERK

By_____dtn________________
Deputy Clerk

AMY M. WOOD
CLERK OF THE COURT

Court of Appeals

STATE OF ARIZONA
DIVISION ONE
STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007

Phone: (602) 452-6700
Fax: (602) 452-3226

June 21, 2017

Donna McQuality, Clerk
Yavapai County Superior Court
Yavapai County Courthouse
120 S Cortez St No 300
Prescott AZ 86301-3868

Dear Ms. McQuality:

RE: 1 CA-CV 15-0371

CUNDIFF et al. v. COX
Yavapai County Superior Court
CV 2003-0399

The following are attached in the above entitled and numbered cause:

Original MANDATE
Copy of MEMORANDUM DECISION

The following items are not available for electronic transmittal and will be physically transmitted to your Court.

Exhibit # 533 - Statement of Facts in Support of Plaintiffs' Motion for Summary Judgment filed 12/28/12; Exhibit # 545 - Controverting Statement in Response to Plaintiffs' Separate Statement of Facts in Support of Motion for Summary Judgment and Defendants' Separate Statement of Facts in Support of Response to Motino for Summary Judgment filed 6/29/15

AMY M. WOOD, CLERK

By_____dtn____________________
Deputy Clerk

A copy of the foregoing
was sent to:

J Jeffrey Coughlin
Mark W Drutz
Sharon Flack
Jeffrey Gautreaux
David K Wilhelmsen
Lance B Payette
David L Mackey

NOTICE NOT FOR OFFICIAL PUBLICATION
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

JOHN B. CUNDIFF and BARBARA C. CUNDIFF, husband and wife; ELIZABETH NASH, a married woman dealing with her separate property; KENNETH PAGE and KATHRYN PAGE, as Trustee of the Kenneth Page and Catherine Page Trust; JAMES VARILEK, as Joined Plaintiff property owner, *Plaintiffs/Appellees,*

v.

DONALD COX and CATHERINE COX, husband and wife, *Defendants/Appellants.*

No. 1 CA-CV 15-0371
FILED 11-3-2016

Appeal from the Superior Court in Yavapai County
No. P1300CV2003-0399
The Honorable Jeffrey G. Paupore, Judge *Pro Tempore*
The Honorable Kenton D. Jones, Judge
The Honorable David L. Mackey, Judge

AFFIRMED

COUNSEL

J. Jeffrey Coughlin, P.L.L.C., Prescott
By J. Jeffrey Coughlin
Counsel for Plaintiffs/Appellees

Favour & Wilhelmsen, P.L.L.C., Prescott
By David K. Wilhelmsen, Lance B. Payette
Counsel for Plaintiff/Appellee James Varilek

Musgrove Drutz Kack & Flack, P.C., Prescott
By Mark W. Drutz, Sharon M. Flack, Jeffrey Gautreaux
Counsel for Defendants/Appellants

MEMORANDUM DECISION

Judge Lawrence F. Winthrop delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Justice Rebecca White Berch[1] joined.

W I N T H R O P, Judge:

¶1 Defendants Donald and Catherine Cox (collectively, "the Coxes") appeal the trial court's summary judgment in favor of Plaintiffs John B. and Barbara C. Cundiff; Elizabeth Nash; Kenneth and Kathryn Page, as Trustee of the Kenneth Page and Catherine Page Trust (collectively, "the Cundiffs"); and James Varilek (collectively, "Appellees") after a more than decade-long dispute over the Coxes' use of their property as a tree and shrub farm supporting their agricultural business in violation of an applicable Declaration of Restrictions ("the Declaration"). The trial court granted summary judgment in favor of Appellees after concluding the Coxes' defenses of waiver and/or abandonment of the Declaration failed as a matter of law. Raising several issues, the Coxes challenge the grant of summary judgment and the court's awards of attorneys' fees to Appellees. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY[2]

¶2 The parties own property in a rural, residential subdivision known as Coyote Springs Ranch. The Coxes began using their property for growing and storing inventory for Prescott Valley Nursery and Prescott

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1 The Honorable Rebecca White Berch, Retired Justice of the Arizona Supreme Court, has been authorized to sit in this matter pursuant to Article VI, Section 3, of the Arizona Constitution.

2 We take a portion of the facts and underlying procedural history from our previous memorandum decision involving the Cundiffs and Coxes. *See Cundiff v. Cox*, 1 CA-CV 06-0165 (Ariz. App. May 24, 2007).

Valley Growers, the retail and wholesale nursery business they own in partnership with their two sons. Partnership employees work at the Coxes' property, but the property is not open to the public, and no sales are conducted on it. The Coxes also live on the property part-time.

¶3 In 2001, the Coxes applied for an agricultural use exemption for the property from Yavapai County. As part of the application for the exemption, Catherine Cox signed a Statement of General Agricultural Use and Affidavit, acknowledging that the primary use of the property is an "agricultural use"; "[a]ny residential use of this property is secondary."

¶4 Properties located in Coyote Springs Ranch are subject to the aforementioned Declaration. Section one of the Declaration provides that all included parcels "shall be known and described as residential." Section two provides that "[n]o trade, business, profession or any other type of commercial or industrial activity shall be [initiated] or maintained within said property or any portion thereof." Section nineteen contains a non-waiver clause that provides in part as follows:

> 19. If there shall be a violation or threatened or attempted violation of any of said covenants, conditions, stipulations or restrictions, it shall be lawful for any person or persons owning said premises or any portion thereof to prosecute proceedings at law or in equity against all persons violating or attempting to, or threatening to violate any such covenants, restrictions, conditions or stipulations, and either prevent them or him from so doing or to recover damages or other dues for such violations. *No failure of any other person or party to enforce any of the restrictions, rights, reservations, limitations, covenants and conditions contained herein shall, in any event, be construed or held to be a waiver thereof or consent to any further or succeeding breach or violation thereof. . . .*

(Emphasis added.)

¶5 In May 2003, the Cundiffs filed a complaint for injunctive relief against the Coxes, and later added a request for declaratory relief, alleging in part that the Coxes' use of the property violated section two of the Declaration. In response, the Coxes asserted the defenses of abandonment, waiver, estoppel, laches, and unclean hands.

¶6 The Cundiffs filed two motions for partial summary judgment—the first asserting the Coxes' waiver defense was precluded by

section nineteen of the Declaration, and the second arguing the Coxes' use of their property violated section two of the Declaration and that the Coxes could not prove their defenses of estoppel, laches, and unclean hands.

¶7 The trial court (Judge David L. Mackey) denied the motion for partial summary judgment as to the waiver issue after finding "a material factual issue regarding whether the restrictions . . . have been so thoroughly disregarded as to result in a change in the area that destroys the effectiveness of the restrictions, defeats the purposes for which they were imposed[,] and amounts to an abandonment of the entire Declaration of Restrictions." The court reasoned that, if the entire Declaration had been abandoned, section nineteen, on which the Cundiffs based their anti-waiver argument, would also have been abandoned.

¶8 As to the Cundiffs' second motion for partial summary judgment, the trial court granted the motion as to the Coxes' defenses of estoppel, laches, and unclean hands, but denied the motion to the extent it sought a summary declaration as to the enforceability of the Declaration. The court scheduled trial for August 2, 2005.

¶9 Before trial, the court denied a motion by the Coxes entitled "Motion to Join Indispensable Parties Pursuant to Rule 19(A), Ariz. R. Civ. P., or, in the Alternative, Motion to Dismiss Pursuant to Rule 12(B)(7), Ariz. R. Civ. P., for Failure to Join Indispensable Parties." In the motion, the Coxes had argued that all persons who owned property governed by the Declaration must be joined because their legal rights could be substantially affected by the outcome of the case.

¶10 The Coxes also filed a motion for partial summary judgment, arguing the use of their property was "agricultural" and, therefore, did not violate section two of the Declaration—the restriction barring trade, business, professional, or other industrial or commercial activity. The trial court, after noting that "restrictions are not favored and [] must be strictly construed," granted that motion and entered partial judgment in favor of the Coxes on all counts in the complaint relying on the Coxes' alleged violation of section two of the Declaration. The parties agreed this ruling was critical to the remaining issues and agreed to a form of judgment that could be immediately reviewed on appeal.

¶11 Both parties appealed, and in a memorandum decision filed May 24, 2007, this court affirmed in part, reversed in part, and remanded. *See Cundiff v. Cox*, 1 CA-CV 06-0165. Noting that the trial court had interpreted existing Arizona case law to hold that restrictions are not

favored and must be strictly construed, but further noting that, at the time of its ruling, the trial court did not have the benefit of our supreme court's then-recent pronouncement in this area, *Powell v. Washburn*, 211 Ariz. 553, 125 P.3d 373 (2006)—which rejected the very rule of construction relied on by the trial court—we concluded that "[t]he Coxes' tree farm is clearly an agricultural business" and "nothing in the Declaration suggests that any one type of business was intended to be excluded from section two of the restrictions." *Cundiff*, 1 CA-CV 06-0165, at ¶¶ 13, 17. Accordingly, application of section two to the Coxes' use of their property was "consistent with the Declaration as a whole." *Id.* at ¶ 18. We further noted that both parties relied on the affidavit of Robert Conlin, an original grantor responsible for preparation and recording of the Declaration, and that as confirmed in Conlin's affidavit, the intent underlying the Declaration was to "ensure[] not only a rural setting, but a rural, residential environment." *Id.* at ¶ 20. Given that interpretation, we concluded "the Coxes' agricultural business use of the property violates section two of the Declaration," and we therefore vacated the judgment against the Cundiffs. *Id.* at ¶¶ 20-21.

¶12 As to the Coxes' appeal, we affirmed the trial court's grant of summary judgment regarding the defenses of estoppel, laches, and unclean hands, *id.* at ¶¶ 20-27, leaving only the defense of abandonment (of the Declaration and, accordingly, section nineteen's non-waiver clause) to be decided. Finally, in addressing the trial court's denial of the Coxes' motion for joinder, we noted that "[a] ruling in this case that the restrictions have been abandoned and are no longer enforceable against the Coxes' property would affect the property rights of all other owners subject to the Declaration." *Id.* at ¶ 32. We concluded "that the absent property owners are necessary parties given the issue to be decided in this case" and must be joined, and directed the trial court to "determine on remand whether these parties are also indispensable under Rule 19(b)," Ariz. R. Civ. P. *Id.* at ¶ 36.

¶13 On remand, the trial court determined that the other property owners subject to the Declaration were indispensable parties, and ordered the Cundiffs to serve and join all necessary and indispensable parties. The Cundiffs took substantial steps to do so, and in April 2011, filed a notice of compliance with the court's order.[3] The case was reassigned to Judge

[3] At a subsequent oral argument on February 13, 2013, counsel for the Coxes was asked by the court whether "all necessary parties have been joined as parties to this lawsuit," and counsel responded affirmatively, although he expressed concern that "no lis pendens was ever recorded" to

Kenton D. Jones on June 30, 2011, after Varilek filed a notice of change of judge pursuant to Rule 42(f), Ariz. R. Civ. P.[4]

¶14 Although the trial court had previously denied the Cundiffs' partial motion for summary judgment on the issue of waiver (after concluding a question regarding abandonment existed), the Cundiffs filed a new motion for summary judgment and supporting statement of facts addressing the only two issues remaining in the case: abandonment and waiver. In their motion, the Cundiffs argued that, at the time the trial court made its initial rulings, the court not only did not have the benefit of *Powell*, it also did not have the benefit of this court's decision in *College Book Centers, Inc. v. Carefree Foothills Homeowners' Association*, 225 Ariz. 533, 241 P.3d 897 (App. 2010), which the Cundiffs argued was analogous. Relying on *College Book Centers*, the Cundiffs maintained that because the Declaration contained a non-waiver provision in section nineteen, that non-waiver provision was enforceable, even despite prior violations of the Declaration, as long as the violations did not constitute a "complete abandonment" of the Declaration. *See* 225 Ariz. at 539, ¶ 18, 241 P.3d at 903. The Cundiffs argued the overall character of the development—which we had characterized in our 2007 memorandum decision as "a rural, residential environment"—had not undergone the fundamental change required to constitute legal abandonment.[5]

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put subsequent property owners on notice of the lawsuit "should they take ownership of the property."

[4] In 2009, Varilek filed a separate complaint seeking to enforce the restrictive covenants against another property owner, Robert Veres, and despite Varilek's objection, that case was consolidated with the Cundiffs' case against the Coxes upon motion by Veres after both Varilek and Veres were served and joined in this case. Varilek's 2009 case had originally been assigned to Judge Mackey, but Varilek had timely exercised his right to a change of judge in that case, and upon consolidation, he again filed a notice of change of judge. In February 2013, Varilek and Veres filed a stipulation to dismiss Varilek's 2009 complaint without prejudice, which the trial court granted. Varilek, however, continued to actively participate in this case.

[5] Section three of the Declaration restricts parcels in Coyote Springs Ranch to no less than nine acres. The Cundiffs attached to their "Statement of Facts in Support of Plaintiffs' Motion for Summary Judgment" an affidavit from John Cundiff stating that, to the best of his knowledge, lots

¶15 After responsive briefing by the parties[6]—including Varilek and Veres—the trial court heard oral argument on April 16, 2013, and took the matter under advisement.[7] In a detailed minute entry filed June 14,

in the subdivision continued to contain no less than nine acres and that the three DVDs attached to his affidavit were video recordings that accurately depicted the appearance of the subdivision. Later, in their reply, the Cundiffs provided records from the Yavapai County Assessor's Office that indicated 280 of the 288 properties subject to the Declaration still consisted of at least nine acres.

[6] In addition to affidavits and other documents they had previously submitted, the Coxes responded with affidavits from their son and a licensed private investigator, Sheila Cahill, who they hired to search through the Coyote Springs Ranch development and document any uses or activities that arguably violated the deed restrictions. The Coxes' proof of abandonment largely consisted of photographs showing properties with any alleged or speculated violations, including but not limited to properties with a visible propane or water tank, a trash receptacle in open view, an "[e]xcessive amount of dogs," structures or sheds that "may not comply" with square footage requirements, multiple buildings, trash in the yard and/or overgrown weeds, and properties on which the residents had parked business vehicles, mobile homes, or trailers, or placed construction materials on the lots. The Coxes also presented evidence that some of the property owners had listed their Coyote Springs Ranch address when obtaining business and contractor's licenses, listing corporate addresses, etc., and asserted that some of the owners were likely operating small businesses out of their homes. (The Coxes had previously submitted the affidavit of Curtis Kincheloe, owner of Coyote Curt's Auto Repair, who affirmed that he operates his business on his residential property.) None of the purported or speculated home business uses, however, appeared to even remotely compare to the scale of the Coxes' commercial enterprise.

[7] Before the April 16 oral argument, the court issued a March 5, 2013 under advisement ruling involving several matters. In its ruling, the court noted that, at a previous oral argument held February 13, 2013, counsel for the Coxes had agreed with Varilek's assertion that the only remaining issue for trial was the Coxes' "affirmative defense that Paragraph 2 [of the Declaration] has been rendered unenforceable through *abandonment*." (Emphasis in original.) The court relied on the parties' representation in its subsequent rulings.

2013, the court granted summary judgment in favor of the Cundiffs, after concluding as a matter of law that Coyote Springs Ranch continued to be a rural, residential environment and, accordingly, the Declaration had not been abandoned.[8]

¶16 Both Varilek and the Cundiffs sought attorneys' fees and costs. In the meantime, the Coxes filed a motion for new trial. In a minute entry filed August 25, 2014, the court denied the motion for new trial, ordered the Coxes to pay Varilek attorneys' fees in the amount of $90,490.00 and costs in the amount of $118.00, and declined to address the Cundiffs' application for attorneys' fees and costs at that time.

¶17 On March 20, 2015, the matter was reassigned to Judge Jeffrey G. Paupore. In a judgment filed April 7, 2015, the trial court denied the Coxes' motion for reconsideration of the August 25, 2014 ruling awarding attorneys' fees to Varilek and awarded attorneys' fees in the amount of $258,986.52 and costs in the amount of $4,117.74 to the Cundiffs.[9] On May 5, 2015, the trial court entered a separate judgment in favor of Varilek, awarding him the amount of attorneys' fees and costs previously ordered, for a total judgment of $90,608.00 in his favor.

¶18 The Coxes filed a motion entitled "Motion for New Trial Re: Award of Attorneys' Fees to Cundiff-Plaintiffs Pursuant to Ariz. R. Civ. P. 59(a) and, in the Alternative, Motion to Alter or Amend Judgment Pursuant

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[8] At the same time, the court denied as moot a motion by Varilek to "Require Defendants Cox to Serve the Indispensable Parties with Documents Comporting with Due Process." Varilek had argued in the motion that some subdivision property owners might not have been joined as necessary, and their rights could be affected if the Coxes' abandonment defense proved successful, because the Declaration could be deemed to be abandoned as to all property owners.

[9] The court noted that the billing statements from attorney David K. Wilhelmsen, who originally represented the Cundiffs in this matter, referenced the Cundiffs as the clients, whereas the billing statements of attorney J. Jeffrey Coughlin, who substituted in as counsel for the Cundiffs in April 2009, "identified the client as Alfie Ware, Coyote Springs." The court stated that it "could find no reference in this lengthy civil litigation case where Mr. Ware was identified as a party Plaintiff. Therefore, Plaintiff's request for reasonable attorneys' fees under the Coughlin affidavit are denied."

to Ariz. R. Civ. P. 59(l)." The Cundiffs objected and also moved to amend the judgment.

¶19 In a minute entry filed June 10, 2015, the trial court granted the Coxes' motion to strike the Cundiffs' motion to amend the judgment, but also denied the Coxes' motions for new trial and to amend the judgment, explaining in part as follows:

> Coxes seek a new trial based upon alleged inconsistent findings of fact, namely: awarding the Wilhelmson attorneys' fees and costs [to the Cundiffs] but denying Coughlin's attorneys' fees and costs [incurred by the Cundiffs]. Cundiffs oppose a new trial and move the Court to amend the Judgment to allow Coughlin's attorney['s] fees and costs pursuant to Rule 59(l).
>
> . . . .
>
> Both parties freely acknowledge the awarding of attorneys' fees and costs is within the discretion of the Court.
>
> On April 7, 2015, the Court awarded Plaintiffs attorneys' fees and costs in the amount of $263,104.26 against Defendant Coxes. Plaintiffs were seeking an additional $93,944.50 for [] Coughlin's attorney['s] fees and costs. [] Coughlin's attorney['s] fees and costs were denied in part because "the client" was identified as Alfie Ware and because the Court determined the amount that was awarded was reasonable.
>
> Defendants Coxes['] position that the award was inconsistent is unfounded. The Court determined the award of attorneys' fees and costs based upon the totality of the case, including but not limited to[] the complexity of issues, the length of litigation, the pleadings, rulings, attorney's billing statements, affidavits, and previous awards of attorney fees. The fact that Alfie Ware advanced litigation costs was one factor in the Court's decision.

¶20 On June 30, 2015, a judgment submitted by the Cundiffs and entitled "Final Judgment Nunc Pro Tunc in Accordance with the Court's April 7, 2015 Ruling" was filed. The Coxes timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2016) and 12-2101(A)(1) (2016).

ANALYSIS

I. *The Trial Court's Consideration of the Motion for Summary Judgment*

¶21 The Coxes argue that, because Judge Mackey had already ruled on the issue of waiver/abandonment, the Cundiffs' new motion for summary judgment violated the doctrine of law of the case and constituted an impermissible horizontal appeal. Judge Mackey, however, did not have the benefit of this court's 2010 opinion in *College Book Centers* when he denied the Cundiffs' motion for summary judgment on the issue in April 2005. Further, after the court's ruling, the parties continued to gather evidence they argued either supported or refuted a finding of abandonment that was not presented to the court in 2005. The doctrine of law of the case is a rule of procedure, not of substance, and does not prevent a court from changing a ruling merely because the court ruled on a question at an earlier stage of the proceedings; "[n]or does it prevent a different judge, sitting on the same case, from reconsidering the first judge's prior, nonfinal rulings." *State v. King*, 180 Ariz. 268, 279, 883 P.2d 1024, 1035 (1994) (citations omitted). The trial court did not err in considering the Cundiffs' subsequent motion for summary judgment on the issue of abandonment. *See Dessar v. Bank of Am. Nat'l Tr. & Sav. Ass'n*, 353 F.2d 468, 470 (9th Cir. 1965).

II. *The Trial Court's Grant of Summary Judgment on Abandonment*

¶22 The Coxes argue the trial court erred in granting summary judgment because the court ignored evidence they presented in their response to the Cundiffs' motion for summary judgment that showed multiple violations of the Declaration by other property owners in Coyote Springs Ranch—violations the Coxes contend are sufficient to create a genuine issue of material fact on their affirmative defense of abandonment.

¶23 We review *de novo* a trial court's grant of summary judgment. *Salib v. City of Mesa*, 212 Ariz. 446, 450, ¶ 4, 133 P.3d 756, 760 (App. 2006). We view the facts and reasonable inferences therefrom in the light most favorable to the party against whom summary judgment was granted. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003).

¶24 Summary judgment is proper when "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). A trial court should grant summary judgment "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the

proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). The mere existence of a scintilla of evidence that creates the slightest doubt as to whether a dispute of material fact exists is insufficient to overcome summary judgment. *Id.* When material facts are not disputed, a trial court may decide the issue as a matter of law. *Ortiz v. Clinton*, 187 Ariz. 294, 298, 928 P.2d 718, 722 (App. 1996).

¶25 Absent an express non-waiver provision, deed restrictions may be considered abandoned or waived "if frequent violations of those restrictions have been permitted." *Coll. Book Ctrs.*, 225 Ariz. at 538-39, ¶ 18, 241 P.3d at 902-03 (quoting *Burke v. Voicestream Wireless Corp. II*, 207 Ariz. 393, 398, ¶ 21, 87 P.3d 81, 86 (App. 2004)). But when, as here, a Declaration contains a non-waiver provision, restrictions remain enforceable, despite prior violations, as long as the violations do not constitute a "complete abandonment" of the Declaration. *Id.* at 539, ¶ 18, 241 P.3d at 903 (quoting *Burke*, 207 Ariz. at 399, ¶ 26, 87 P.3d at 87). Deed restrictions are considered completely abandoned when "the restrictions imposed upon the use of lots in [a] subdivision have been so thoroughly disregarded as to result in such a change in the area as to destroy the effectiveness of the restrictions [and] defeat the purposes for which they were imposed." *Condos v. Home Dev. Co.*, 77 Ariz. 129, 133, 267 P.2d 1069, 1071 (1954), *quoted in Coll. Book Ctrs.*, 225 Ariz. at 539, ¶ 18, 241 P.3d at 903.[10]

¶26 In evaluating the Cundiffs' motion for summary judgment on the issue of abandonment/waiver, the trial court applied the standard adopted by this court in *College Book Centers* to the intent behind the Declaration of ensuring "a rural, residential environment." The court noted that the Coxes had "based their assertion of the abandonment and waiver of the [Declaration] on 1) an affidavit of Defendant Cox, and 2) a survey of the subdivision properties by a private investigator, Sheila Cahill, and research done by Ms. Cahill through the records of government offices." In examining the evidence proffered by the Coxes, the court found the Coxes' "assessment of the Cahill determinations is troubling as many of the

[10] The parties disagree as to the standard of proof for showing abandonment: Varilek argues the proponent of abandonment has the burden of proving it by clear and convincing evidence, and the Coxes maintain the proper burden is a preponderance of the evidence. Neither side points to controlling Arizona law on this issue, and, as the Coxes suggest, we simply apply the standards for determining summary judgment and abandonment as discussed above. In any event, we conclude that the record fully supports the trial court's decision to grant summary judgment.

notations of Cahill indicate conduct not 'intended' to be prohibited under the [Declaration]." The court also found numerous other claimed violations were unsupported and/or involved mere speculation. Although the court also found some observable violations of the Declaration, such as "bottled gas tanks not below ground and trash receptacles visible; in one instance a couch sitting outside, and in another some amount of construction materials located on properties where construction company owners reside," the court further found "no real debate that the property remains rural," and "the only portion of Coyote Springs [Ranch] that has been utterly given over to a non-residential use [with the exception of a church] is that of Defendants Cox; that being their use of their 19 acres for purely commercial purposes." In granting the motion for summary judgment, the court concluded that the items addressed by Cahill and upon which the Coxes relied "do not illustrate, in any fashion, a complete abandonment and thorough disregard of the intention of the Declarants that the property remain rural and residential."[11]

¶27 The trial court's findings and conclusions are overwhelmingly supported by the record. As the Cundiffs noted in their motion for summary judgment, the DVDs submitted by the Cundiffs reveal "acres and acres of land within the subdivision [that] consist of flat, grassy, fenced, rural, residential properties." The neighborhood continues to have narrow, often dirt, roads and the physical appearance of a rural, residential community. Although a few properties in the Coyote Springs Ranch subdivision apparently do house a small commercial enterprise, nothing in the record supports the conclusion that the fundamental character of Coyote Springs Ranch has changed from that of a rural, residential

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[11] The Coxes argue that the trial court erred in focusing solely on section two of the Declaration and overlooked their assertions and documentation of violations of other restrictions contained in the Declaration. The Coxes' argument appears to run counter to their previous concession that the only remaining issue for trial was their affirmative defense that section two of the Declaration had been rendered unenforceable through abandonment, and section eighteen of the Declaration, which provides that "[i]nvalidation of any of the restrictions, covenants or conditions above by judgment or court order shall in no way affect any of the other provisions hereof, which shall remain in full force and effect." Moreover, the record is clear that the trial court carefully considered the Coxes' allegations of other violations of the Declaration before rejecting their defense of abandonment.

neighborhood.[12] The trial court correctly applied the standards adopted in *College Book Centers* and *Condos* to the intent behind the Declaration of ensuring "a rural, residential environment," and did not err in concluding as a matter of law that the Declaration had not been completely abandoned and in granting summary judgment in favor of the Cundiffs.[13]

III. Joinder of Indispensable Parties

¶28 The Coxes also argue that the trial court's entry of summary judgment should be considered "invalid" because not all Coyote Springs Ranch property owners had been joined in the litigation when summary judgment was granted, and pursuant to the trial court's prior order and Rule 19, Ariz. R. Civ. P., all necessary and indispensable parties were required to be included before entry of an order summarily disposing of the case.[14] The Coxes' argument ignores the record in this case—including the

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12 Moreover, as the trial court correctly recognized, many of the violations of the Declaration as alleged by the Coxes involve speculation and/or do not appear to be prohibited by a careful reading of the Declaration. Also, as Conlin noted in his affidavit, "[t]he covenant against trade, business, commercial or industrial enterprises was not intended to prohibit against landowners or occupiers from maintaining a home-office in their residence, from parking or maintaining their business vehicles or equipment on their property, or from indicating to the public that they had a home office at their residence."

13 Relying on section eighteen of the Declaration, the Coxes argue "complete" abandonment of the Declaration is not required to prove invalidation of section two of the Declaration. But nearly all of their evidence of violations consists of purported violations of sections other than section two, and thus, applying section eighteen would simply mean that if one of the other sections were found to be invalid through a judgment or court order, section two would continue to be valid. Moreover, to invalidate section nineteen of the Declaration—the non-waiver provision, which applies to all other sections of the Declaration—the Coxes still needed to show complete abandonment of the Declaration itself.

14 The Coxes assert, without citation to the record, that "[m]any property owners in Coyote Springs [Ranch] who have an interest in this matter were never advised of the lawsuit [or] had the opportunity to appear and state their position"; however, the only property owner the Coxes identify as an "example" supporting their assertion is Jerry Carver, who

Cundiffs' efforts at joining all parties and the Coxes' subsequent representation to the court—as well as the court's correct finding that summary judgment in favor of the Cundiffs made the Coxes' argument moot.

¶29 The indispensability of parties is a question of law, which we review *de novo*. *Gerow v. Covill*, 192 Ariz. 9, 14, ¶ 19, 960 P.2d 55, 60 (App. 1998) (citations omitted).

¶30 In this case, on remand from this court's May 24, 2007 memorandum decision, the trial court found that all property owners subject to the Declaration were indispensable parties, and ordered the Cundiffs to serve those necessary and indispensable parties with a summons, a copy of the First Amended Complaint, and a notice approved by the court. As ordered, the Cundiffs filed with the court in both paper and electronic form the list of Coyote Springs Ranch property owners, sent requests to the property owners to accept service of the aforementioned documents, and filed all acceptances received with the court.

¶31 Next, as ordered by the court, the Cundiffs identified the property owners who refused to accept service, sent them the court-ordered documents by certified mail, and filed all signed return receipts received with the court. Then, as ordered, the Cundiffs identified any owners who had both refused to sign the acceptance of service and refused to claim or sign their certified receipts, delivered the service packets to a process server for personal service, and filed with the court the certificates of service for those property owners the process server was able to serve.

¶32 After exhausting the other methods of service, the Cundiffs requested permission to serve the remainder of the necessary and indispensable parties by publication. The court found the Cundiffs had

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appeared at the April 16, 2013 oral argument and advised the court he would not concede the court had jurisdiction over him. Carver was served, however, had notice of the proceedings, and was provided the opportunity to state his position at oral argument. The Coxes also rely on Varilek's "Motion to Require Defendants Cox to Serve the Indispensable Parties with Documents Comporting with Due Process," in which he argued in part that service on some property owners might be defective because it appeared to him that, in some instances, only one of two spouses had been served or property owners who had recently purchased property in the subdivision might not have been served. Varilek did not, however, specifically identify any such property owners.

taken substantial steps to join all of the necessary and indispensable parties in a timely manner, noted that there was a discrepancy between the clerk of the court's records and the number of owners the Cundiffs had served, ordered the Cundiffs' counsel to meet with the clerk to reconcile the differences, and granted the Cundiffs permission to serve the remaining property owners by publication. Counsel for the Cundiffs met with the clerk of the court, reconciled the differences, filed a revised property list, and ultimately filed a proof of service by publication on all remaining property owners with the court. The Cundiffs then filed a notice of compliance with the court's service order.

¶33 Later, when asked by the court if all necessary parties had been joined as parties to the lawsuit, counsel for the Coxes responded affirmatively. *See supra* note 3. Although counsel did express concern that no lis pendens had been recorded to warn subsequent purchasers of the lawsuit, the Coxes point to no subsequent purchasers who were not joined or otherwise put on notice. The record as provided this court does not support the Coxes' argument.

¶34 Moreover, even if some property owners were not joined, the court did not err in deciding the motion for summary judgment and concluding Varilek's motion was moot. Varilek had argued that property owners who had not been joined could have their property rights negatively affected if the Coxes' abandonment defense proved successful, because the Declaration could be deemed to be abandoned as to all property owners. Varilek's argument essentially echoed the concerns we identified in our previous memorandum decision. *See Cundiff*, 1 CA-CV 06-0165, at ¶¶ 32 ("A ruling in this case that the restrictions have been abandoned and are no longer enforceable against the Coxes' property would affect the property rights of all other owners subject to the Declaration."), 35 ("[E]ven if a ruling in favor of the Coxes on their affirmative defense of abandonment were to apply only to the Coxes' property, all property owners['] rights would still be affected simply by the Coxes' continued use of their property, or by any future use adverse to the restrictions."). In this case, however, any concern about the erosion or loss of property rights is not implicated because the trial court concluded the Declaration had not been abandoned. Thus, the Coxes' reliance on *Karner v. Roy White Flowers, Inc.*, 527 S.E.2d 40

(N.C. 2000), is misplaced.[15] The elimination of the Coxes' abandonment defense rendered any argument regarding joinder moot.[16]

IV. The Trial Court's Awards of Attorneys' Fees

A. Award of Attorneys' Fees to the Cundiffs

¶35 The Coxes next argue that the trial court abused its discretion in awarding attorneys' fees to the Cundiffs for the legal services of Wilhelmsen because a nonparty, Alfie Ware, helped fund the Cundiffs' litigation, and the Cundiffs have no enforceable obligation to repay Ware.

¶36 A court has discretion in determining whether to award attorneys' fees pursuant to A.R.S. § 12-341.01. *Wang Elec., Inc. v. Smoke Tree Resort, LLC*, 230 Ariz. 314, 327, ¶ 48, 283 P.3d 45, 58 (App. 2012). In general, we review an award of attorneys' fees under § 12-341.01 for an abuse of that discretion, and will affirm unless no reasonable basis exists for the award. *Hawk v. PC Vill. Ass'n*, 233 Ariz. 94, 100, ¶ 19, 309 P.3d 918, 924 (App. 2013). For a party to recover attorneys' fees, two specific requirements must be met: (1) an attorney-client relationship between the party and counsel, and (2) a genuine financial obligation on the part of the party to pay such fees. *Moedt v. Gen. Motors Corp.*, 204 Ariz. 100, 103, ¶ 11, 60 P.3d 240, 243 (App. 2002) (citing *Lisa v. Strom*, 183 Ariz. 415, 419, 904 P.2d 1239, 1243 (App. 1995)).

¶37 The Coxes do not dispute that the Cundiffs have maintained the necessary attorney-client relationship with their attorneys. Moreover,

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15 *Karner* held that "[a]n adjudication that *extinguishes* property rights without giving the property owner an opportunity to be heard cannot yield a 'valid judgment.'" 527 S.E.2d at 44 (emphasis added).

16 Further, contrary to the Coxes' suggestion, the ruling does not prevent any other property owners from attempting to show abandonment of the Declaration in the future. Also, we reject the Coxes' suggestion that property owners who wish to or currently use their property in ways that violate the language of the Declaration should be insulated from future lawsuits. We additionally reject the Coxes' argument that the doctrine of law of the case should have prevented the court from finding the issue of joinder moot. *See generally King*, 180 Ariz. at 279, 883 P.2d at 1035; *Dessar*, 353 F.2d at 470; *see also Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176 Ariz. 275, 279, 860 P.2d 1328, 1332 (App. 1993) (providing exceptions to law of the case doctrine).

the Cundiffs submitted an affidavit in support of their attorneys' fees request stating that, although Ware had helped to fund the litigation, the Cundiffs had entered an agreement in 2003 "to repay Alfie Ware for all of the attorney's fees and costs that he would pay for the litigation," and that they had in fact paid Ware a portion of the amount owed. Although the Coxes rely on *Lisa* for their argument that the Cundiffs' agreement with Ware renders the Cundiffs' obligation illusory, *Lisa* is distinguishable. In *Lisa*, the court noted that "the Lisas candidly admit that, although there was an oral fee agreement, neither Mrs. Lisa nor the community would reimburse either Mr. Lisa [an attorney] or Lisa & Associates for any time expended, absent an award of fees by the court." 183 Ariz. at 420, 904 P.2d at 1244. On this record, we are not presented with the same set of facts, and find no error in the trial court's decision to award attorneys' fees to the Cundiffs.

B. Reasonableness of the Fees Award

¶38 The Coxes also argue the amount of fees awarded to the Cundiffs was unreasonable because some of the work was unnecessary, duplicative, or for issues on which the Cundiffs did not prevail. We disagree.

¶39 Any attorneys' fees award must be reasonable. *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 185-86, 673 P.2d 927, 929-30 (App. 1983). In considering the reasonableness of a fee award, the court must determine whether the hourly rate is reasonable and whether the hours expended on the case are reasonable. *Id.* at 187-88, 673 P.2d at 931-32. "[W]here a party has accomplished the result sought in the litigation, fees should be awarded for time spent even on unsuccessful legal theories." *Id.* at 189, 673 P.2d at 933.

¶40 The record indicates the trial court fully and carefully considered the reasonableness of the Cundiffs' attorneys' fees request and, after such consideration, awarded only a portion of the amount requested. Further, the Cundiffs fully achieved the result they sought in the litigation. On this record, we find no abuse of the trial court's discretion.

C. Award of Attorneys' Fees to Varilek

¶41 The Coxes also argue the trial court erred in awarding attorneys' fees to Varilek because he asserted he was not a party to the case.

¶42 The record is clear, however, that after being served and joined in this case in 2010, Varilek specifically requested alignment with the

Cundiffs, and he actively participated throughout the remainder of the case, even after his lawsuit against Veres—which was consolidated into this case[17]—was dismissed without prejudice. Moreover, although the Coxes point out that Varilek argued at the February 13, 2013 oral argument that "it's our position that we are not a party" and "have simply aligned with the plaintiffs," the trial court rejected that position in granting dismissal of the consolidated case; instead, the court made clear in its March 5, 2013 under advisement ruling that it considered Varilek to be an active party to the litigation:

> WHILE THE COURT has received the[] "Stipulation to Dismiss Without Prejudice," filed by the Parties in *Varilek v Veres*[] (P1300 CV 2009 0822); that being separately filed litigation previously consolidated with *Cundiff v Cox* (P1300 CV 2003 0399), the Court does not interpret the dismissal of *Varilek*, [*id.*], as making moot Varilek's Response in regard to this immediate issue [allowing Conlin to testify as a witness for the purpose of interpreting the Declaration] or allowing Varilek and/or Veres to extricate themselves from this case, as Varilek and Veres remain necessary Parties to the *Cundiff v Cox*[] litigation.

¶43 The Coxes further argue Varilek was not eligible for an award of attorneys' fees because he never requested attorneys' fees in a pleading pursuant to Rule 54(g)(1), Ariz. R. Civ. P.[18] However, after Varilek filed his July 1, 2013 motion for an award of attorneys' fees, the Coxes did not assert in their response that Varilek had failed to comply with Rule 54(g). Instead, as they acknowledge, they raised this argument for the first time in their "Motion for Reconsideration Re: August 25, 2014 Ruling Re: Attorneys' Fees Awarded in Favor of Varilek." We generally do not consider arguments on appeal that were first raised in the trial court in a motion for reconsideration, *Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, 240-41 n.5, ¶¶ 15-16, 159 P.3d 547, 550-51 n.5 (App. 2006), and we decline to do so here.

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17 Without record support, Varilek asserts that he requested attorneys' fees in his complaint against Veres. The Coxes do not dispute Varilek's assertion.

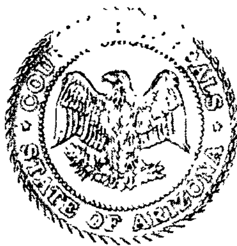
18 Varilek first made a claim for attorneys' fees in his joinder to the motion for summary judgment filed by the Cundiffs.

V. Costs and Attorneys' Fees on Appeal

¶44 The parties request costs and attorneys' fees on appeal pursuant to A.R.S. § 12-341.01. The Coxes are not the prevailing parties, and their request is denied. Appellees are the prevailing parties; accordingly, in our discretion, we award taxable costs and an amount of reasonable attorneys' fees on appeal to Appellees, contingent upon their compliance with Rule 21, ARCAP.

CONCLUSION

¶45 The trial court's summary judgment and awards of attorneys' fees are affirmed.



AMY M WOOD • Clerk of the Court
FILED AA

Exhibit C

Letter from the Arizona State Bar Association

Regarding Plaintiff's prior CC&R enforcement case.

Exhibit C

Assistant's Direct Line: 602-340-7253

February 2, 2018

Nancy Knight
1803 E. Lipan Cir.
Fort Mohave, AZ 86426

Re: File No: 17-3879
Respondent: Paul Lenkowsky

Dear Ms. Knight:

I reviewed your submission regarding Mr. Lenkowsky. After speaking with both you and Mr. Lenkowsky, I have determined that further investigation is not warranted at this time and our file has been closed.

To the extent that you are alleging legal malpractice, which appears to be the bulk of the allegations set forth in the Complaint that you submitted to this Office, you will need to consult with an attorney because the State Bar does not handle such claims.

The Complaint makes numerous allegations against Mr. Lenkowsky. I will address a few of those here. The submission alleges that Mr. Lenkowsky refused to amend the Complaint to include a claim against the County. Mr. Lenkowsky states that he advised you at the inception of the representation that he would not pursue such a claim on your behalf.

The submission further alleges that Mr. Lenkowsky should have recorded a Lis Pendens upon learning that the subject real estate had been put up for sale. However, given that the underlying litigation deal solely with compliance issues related to the CC&Rs, Mr. Lenkowsky states that there would have been no legal basis to do so and may have exposed you to civil liability.

Pursuant to Rule 70(a)(4), Ariz. R. Sup. Ct., the record of this charge will be public for six months from the date of this letter. Pursuant to Rule 71, Ariz. R. Sup. Ct., the State Bar file may be expunged in three years.

Sincerely,

Stacy L. Shuman

Stacy L. Shuman
Bar Counsel - Intake

SLS/sb

4201 N. 24th Street • Suite 100 • Phoenix, AZ 85016-6266
PH: 602.252.4804 • FAX: 602.271.4930 • WEBSITE: www.azbar.org

Exhibit D

Jan 31, 2020 email to Mr. Oehler and copied to the Court's Judicial Assistant Lecher.

nancyknight

Exhibit D
2 pgs

From: "nancyknight" <nancyknight@frontier.com>
Date: Friday, January 31, 2020 5:41 AM
To: <djolaw@frontiernet.net>
Cc: "Danielle Lecher" <DLecher@courts.az.gov>
Attach: CC&R_ 4076D_1990.pdf
Subject: Ludwig 2018 04003 _ Evidence of possible false claims made to the court

Dear Mr. Oehler,
Pursuant to your Reply to my Response to your MSJ, and in regards to your claim that Tract 4076-D is some kind of "legal mirror image of Tract 4163", this statement is in conflict with the evidence. Tract 4076-D has its own Declaration of CC&Rs. See attached. I have not been adjudicated rights to prosecute violations in Tract 4076-D. Please verify your claims before submitting statements to the court for which I am denied a Reply to your Reply or please advise on how you came to make this possible false claim to the Court and revise your Reply accordingly if it was an error on your part.

In accordance with Rule 11
(a) Signature.
(1) *Generally.* Every pleading, written motion, and other document filed with the court or served must be signed by at least one attorney of record in the attorney's name--or by a party personally if the party is unrepresented. The court must strike an unsigned document unless the omission is promptly corrected after being called to the filer's attention.
(b) Representations to the Court. By signing a pleading, motion, or other document, the attorney or party certifies that to the best of the person's knowledge, information, and belief formed after reasonable inquiry:
(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.
(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Further, I find no violation on my part in following the instructions I was provided for Rule 56 c 3. I numbered the paragraphs in my Responses and I provided evidence in support of the need for a jury trial on multiple levels, any one of which would provide the Court with reason to deny your client's Motion for dismissal. If you have instructions that are not available to me in my search of Court rules, please amend your MSJ to comply with the moving party's instructions to the respondent.

Tract 4163 does not have its own Declaration of CC&Rs because Parcel VV is covered in the Declaration of CC&Rs for Tract 4076-B. This is a part of the record and findings of the Court when the Court ruled on my rights to prosecute violations in Tract 4076-B. As I provided to you in your Request for Documents and Things, the **Arizona State Bar Association has also confirmed that case CV 2016 04026 was a CC&R enforcement matter** (Attorney Lenkowsky was the first to author the CC&R violation in that Complaint and Attorney Moyer is a recognized expert in CC&R litigation for which he was hired by my husband and I upon Mr. Lenkowsky's withdrawal. In fact, the Hon. Judge Langford entered into a discussion with Mr. Moyer at our mediation hearing regarding Mr. Moyer's other CC&R case that had the Army Corps of Engineers involved. There is no dispute as to prior enforcement of the CC&Rs in Tract 4076-B for which you have direct knowledge as a defense counsel in that case. Plaintiff does not have a chain link fence and you have been provided with Redmond Construction's "ball netting" to describe the safety netting made of chain link fabric that is customary on golf course property where metal netting is especially needed based on a high risk of force that may break through other types of fabric.

Regarding "remedy" which you chose to define as "cures", I included "remedies" which the jury and the court seeks in such matters and included evidence of remedy that I have had to suffer at the hands of CC&R violations on my property. I included remedy that T&M enforced per his imposed upon CC&R fence conditions. The CC&Rs have not been abandoned. Further, as I am sure you are aware, the non-waiver clause has been upheld by the Courts in a number of cases.

It matters not that my property has setback errors of less than one foot side and rear. Remedy is available if your client wishes to counterclaim against me, T&M Development, Mohave County, and the building contractor.

It is clear that metal signs with long-term exposure to the elements become a danger to persons and property. Your own photographic evidence supports the safety hazards that exist. The lack of the constitutionality issue was raised in the one Appeals Court case found on signage whereby an HOA attempted to enforce their signage restriction against a property owner of an

undeveloped lot. That sign had not been posted long-term and therefore the safety issue and constitutionality issue was not available as a defense at that time. It is available for jury consideration today.

Regarding prior "Reconsideration of Tract 4076-A", my response to your MSJ included additional new evidence for the Court that the official name of our Subdivision is Tract 4076. This evidence is the recorded Denial of your client's attempted violation of our CC&Rs through BOS Resolution Amendments. The Preliminary Plat, by your own admission, "creates" a subdivision. The County recognizes my subdivision as Desert Lakes Golf Course and Estates Subdivision Tract 4076 and uses the "approved" preliminary plat by County officials when signing the County Certificate for the Board to approve all subsequent phases of development within the 300+ acre Tract 4076 Subdivision.

Respectfully,
Nancy

Exhibit E

Pertinent 8 pages from the Sign Ordinance

(Emphasis supplied by encircling, underscoring, and written notes.)

Exhibit E

Section 42. - SIGN ORDINANCE.

(As amended by BOS Resolution 2018-157)

A. Purpose. The purpose of this section is to provide fair, comprehensive, and enforceable regulations that will ensure the public health, safety and welfare; provide a good visual environment for Mohave County while providing for the advertisement of goods and services without encumbering free speech, Signs are regulated to:

1. Protect property values in the County;
2. Preserve the beauty and unique character of the County's scenic routes;
3. Provide an improved visual environment for the residents of, and visitors to, Mohave County;
4. Protect the motoring and pedestrian traffic from hazards due to distractions or obstructions caused by improperly located signs;
5. Promote travel and the free flow of traffic within the county;
6. Prevent undue visual competition;
7. Facilitate signs advertising businesses, goods and services, and signs containing other statements protected by the First Amendment to the Constitution of the United States.
8. Regulate the time, place and manner in which the sign can be displayed.

B. Definitions. The following words, terms and phrases, when used in this section, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning.

Abandoned Sign: A sign which no longer correctly advertises an ongoing business, a bona fide lessor or owner, an available product, or activity conducted or product available on the premises where such sign is displayed. Whether a sign has been abandoned, or not shall be determined by the intent of the owner of the sign.

Administrator: The Development Services Director of Mohave County or their designated representative.

Advertising Message: That copy on a sign describing products or services being offered to the public. This shall mean any writing, printing, painting, display, emblem, drawing, sign, or other device designed, used, or intended for outdoor display or any type of publicity or propaganda for the purpose of making anything known or attracting attention to a place, product, or service.

Advertising Sign: see "Sign."

Alter or Alteration: The changing in structural components or decrease or increase in size, height and location. It shall also mean any change in advertising content if such change causes the sign to change in classification from an on-premises sign to an off-premises sign or vice versa, or a change in electrical loads.

Animated Sign: A sign employing actual motion, the illusion of motion, or light and/or color changes achieved through mechanical, electrical or electronic means. Animated signs, which are differentiated from changeable signs as defined herein, include the following types:

Identification Sign: A sign which is limited to the name, address, and number of a building, institution or person, and to the activity carried on in the building or institution, or the occupancy of the person.

Incidental Sign: A sign pertaining to goods, products, services, or facilities that are available on the premises where the sign is located. See On-Premises Sign.

Indirectly Illuminated Sign: Any sign that reflects light from a source intentionally directed upon it; i.e., by means of floodlights or fluorescent light fixtures.

Individual Letter Sign: Any sign made of self-contained letters that are mounted on the face of a building, top of a parapet, roof edge of a building, or on top of or below a marquee.

Interior Property Line: Property lines other than those fronting on street, road, or highway.

Lintel: In this context, the line above the display windows and below transom windows (if any) on a store (usually approximately 9'0" from grade).

Lot: A legally defined and delineated parcel of land exclusive of easements for road purposes having direct access to a dedicated public road, or way.

Maintenance (Maintain): The replacing or repairing of a part or portion of a sign made unusable by ordinary wear, tear, or damage beyond the control of the owner. The word maintenance shall not include, however, any act that requires that a permit be obtained.

Message: The wording or copy on a sign.

Monument Sign: Freestanding signs with a maximum height of six (6) feet. The base of the sign is either placed entirely upon the ground or no more than twelve (12) inches above the ground.

Mural: Any picture, scene, or diagram painted on any exterior walls or fence. The area of a mural that does not contain copy mentioning or depicting a specific business is not a sign and shall not be considered in the calculation of sign area.

Nameplate: A non-electric sign identifying only the name and address of the occupant of the premises on which the sign is located.

Noncommercial Messages: Any noncommercial messages for visual communication that is used for the purpose of bringing the subject thereof to the attention of the public; but not including any flag, badge or insignia of any government or governmental agency, or any civic, charitable, religious, patriotic, fraternal, or similar organization, and further, not including any lawful display of merchandise.

Nonconforming Sign (Legal): Any advertising structure or sign which was lawfully erected and maintained prior to such time as it came within the purview of these Regulations and any amendments thereto, and which fails to conform to all applicable regulations and restrictions of these Regulations, or a nonconforming sign for which a special permit has been issued.

On-Premises (On-Site) Sign: Any sign identifying or advertising a business, person, activity, goods, products, or services, located on the premises where the sign is installed and maintained.

Off-Premises (Off-Site) Sign: Any sign that advertises goods, products, entertainment, services, or facilities, and directs persons to a different location from where the sign is installed.

Owner: Any individual, firm, association, syndicate, co-partnership, corporation, trust, or any other legal entity having a vested or contingent interest in the property in question.

Parapet or Parapet Wall: That portion of a building wall that rises above the roof level.

Person: Any individual, corporation, association, firm, partnership, and the like, singular or plural.

Pole Sign: see "Freestanding Sign."

Portable Sign: Any sign not permanently attached to the ground or a building.

Premises: An area of land with its appurtenances and building which, because of its unity of use, may be regarded as the smallest conveyable unit of real estate.

Projecting Signs: A sign, other than a wall sign, which is attached to and projects from a structure or building face. The area of double-faced projecting signs is calculated on one (1) face of the sign only, provided the same message appears on both sides.

Public Right-of-Way Width: The perpendicular distance across a public street, measured from property line to property line. When property lines on opposite sides of the public street are not parallel, the public right-of-way width shall be determined by the County Engineer.

Public Service Information Sign: Any sign intended primarily to promote items of general interest to the community such as time, temperature and date, atmospheric conditions, news or traffic control, etc.

Repair: see "Maintenance." NOTE: No Real Estate language

Roof Sign: Any sign erected upon, against or directly above a roof or on top of or above the parapet of a building. All support members shall be free of any external bracing, guy wires, cables, etc. Roof signs shall not include signs defined as wall signs.

Rotating Signs: Any sign or portion of a sign that moves in a revolving or similar manner.

Sign: Any identification, description, illustration or device illuminated or non-illuminated which is visible from any public place or is located on private property and exposed to the public and which directs attention to a product, services, place, activity, person, institution, business or solicitation, including any permanently installed or situated merchandise; or any emblem, painting, banner, pennant, placard or temporary sign designed to advertise, identify or convey information, with the exception of window displays and national flags. For the purpose of removal, signs shall also include all sign structures.

Sign Area: The area of the largest single face of the sign within a perimeter which forms the outside shape, including any frame that forms an integral part of the display, but excluding the necessary supports or uprights on which the sign may be placed. If the sign consists of more than one section or module, all areas will be totaled.

Sign Structure: Any structure that supports, has supported, or is capable of supporting a sign, including decorative cover.

Swinging Sign: A sign installed on an arm or spar that is not, in addition, permanently fastened to an adjacent wall or upright pole.

Temporary Sign: Any sign, banner, pennant, valance, or advertising display intended to be viewed for a period of time not exceeding ninety (90) days, or other time limit as specified by these Regulations.

Transom Windows: A window above a door or other window built on and often hinged to a horizontal crossbar.

Under Canopy or Marquee Sign: A sign suspended below the ceiling or roof of a canopy or marquee.

Unlawful Sign: A sign which contravenes these Regulations or which the Director may declare as unlawful if it becomes dangerous to public safety by reason of dilapidation or abandonment, or a nonconforming sign for which a permit required under a previous ordinance/regulation was not obtained.

Wall Sign (or Fascia Sign): A sign attached to or erected against the wall of a building with the face in a parallel plane to the plane of the building wall, and extending no further than six (6) inches from the wall.

Window Sign: A sign installed inside a window for the purposes of viewing from outside the premises. This term does not include merchandise located in a window.

C. Permits.

1. Requirements. Except as otherwise provided in these Regulations, it shall be unlawful for any person to erect, construct, enlarge, move, alter or convert any sign in the County, or cause the same to be done, without first obtaining a sign permit for each such sign from the County Development Services Department as required by these Regulations.

2. Routine Maintenance Exempt. A permit shall not be required for the change in copy or wording including the business and/or product advertised, provided that the change does not change the sign from an on-premises sign to an off-premises sign; the reprinting, cleaning and other normal requirements of maintenance or repair of a sign or sign structure for which a permit has previously been issued, so long as the sign or sign structure is not modified in any way.

3. Expiration of Permits. Every sign permit issued by the Mohave County Development Services Department shall become null and void if construction is not commenced within one hundred eighty (180) days from the date approved, and if construction is not completed within two hundred forty (240) days.

4. Fees. At the time of application for a sign permit, the applicant shall pay the permit fee based on the then applicable fee schedule. In addition, when any sign is hereafter erected, placed, installed or otherwise established on any property prior to obtaining permits as required by these Regulations, the fees specified hereunder shall be doubled but the payment of such double fee shall not relieve any person from complying with other provisions of these Regulations or from penalties prescribed herein.

of said sloping roof, but the top of the sign must be a minimum of one (1) foot below the top of the roof line.

7. Other signs.

   a) Incidental signs. Up to two (2) incidental signs may be attached perpendicular to the wall. Such signs are restricted to credit cards accepted, official notices of services required by law, and/or trade affiliations. Area of each sign may not exceed five (5) square feet; the total area of all such signs may not exceed ten (10) square feet.

   b) Directional signs. One (1) such sign is permitted near each driveway. Area of each sign may not exceed twelve (12) square feet. Maximum permitted height shall be twelve (12) feet.

   c) Manual or automatic changeable copy signs. Any of the types of signs permitted in these Regulations may be permitted as manual or automatic changeable copy signs.

8. Every sign shall have the name of the maker, the date of the erection, and the permit number. Such information shall be clearly legible and in a conspicuous place on each sign installed.

I. Signs Permitted by Zoning.

1. Signs permitted in residential zones. The following on-premises signs are permitted in residential zones: Note: Fairway Const. Signs do not qualify.

   a. Multi-family residential uses may have one (1) indirectly lighted or unlighted identification sign of a maximum of thirty (30) square feet in area, placed on a wall of the building containing only the name and address of the building and one monument sign not to exceed seventy-two (72) square feet at the entrance.

   b. Subdivision signs. Subdivisions and planned communities may have one monument sign not to exceed seventy-two (72) square feet at each entrance.

   c. Temporary signs as allowed in Section 42.E of these Regulations.

   d. Two (2) signs pertaining to a garage or yard sale, limited in area to four (4) square feet, and shall be allowed only during the sale, not to exceed five (5) days.

2. Signs permitted in a manufactured home park and RV Park. A manufactured home park shall be allowed one (1) sign.

3. Shadow lighted or unlighted identification signs, not exceeding thirty (30) square feet when erected parallel to the right-of-way.

4. Permitted on-premises signs in commercial and industrial zones.

   a. One (1) freestanding sign, that complies with Section 42.I.1, indicating the name, nature and/or products available on the developed parcel not to exceed one (1) square foot of sign area for each linear foot of street frontage abutting the developed portion of said parcel.

   b. Freestanding signs may be allowed to set back from the interior property lines a distance of one (1) foot. In no instance shall a sign be erected less than one (1) foot from any interior property line, nor shall any sign be erected in such a manner as to allow any portion of any sign to encroach upon or overhang above any adjacent property.

   c. No freestanding sign shall exceed the height or area established by Table 1, Section 42.I.1. No height limit is specified for signs placed flat against the wall of a building for other attached signs, provided all other provisions of these Regulations are complied with.

d. With the exception of a freestanding sign, a sign may be located within or project into a required front or street side yard setback area, if the setback area extends five (5) feet. However, no sign may project into or over an abutting public right-of-way except as otherwise provided for in these Regulations.

e. Freestanding signs shall be located so as to provide a clear view of vehicular and pedestrian traffic. However, no sign may project into or over an abutting public right-of-way except as otherwise provided for in these Regulations.

f. Animated and intensely lighted signs and moving signs may be permitted as one of the allowed on-premises signs in a commercial zone upon the approval of a Special Use Permit. However, these signs shall comply with the following:

1) Animated and intensely lighted signs and moving signs are prohibited along interstate, primary and secondary highways, including but not limited to, State Highways 95, 93, 68, 66, 389, Interstate 40 and Interstate 15.

2) All animated signs, intensely lighted signs and moving signs shall be located to comply with the front and side street yard setbacks required of a building on the same parcel or lot.

3) Signs shall not interfere with traffic, or distract drivers or pedestrians. Moving or flashing lights shall be white or clear.

4) Signs shall be a minimum of one hundred (100) feet from residentially zoned property or property used for residential purposes.

5) Signs shall comply with Section 38, Outdoor Light Control.

6) The zoning use permit application shall include a site plan showing the location of all signage on the lot or parcel; a rendering of the sign showing colors of sign and lights, areas of sign that will blink, move or flash shall be submitted.

J. Off-premises signs. The intent of this regulation is to permit off-premises signs within established commercial and industrial areas. The purpose of this regulation is to establish basic standards and criteria pertaining to manner, place, and maintenance of off-premises signs in Mohave County. Off-premises signs shall be permitted in accordance with the specific standards set forth in this section as well as to include the general provisions for freestanding signs which are intended to regulate on-premises signs.

1. Except as provided in these Regulations, it is the policy of the Board of Supervisors and Planning and Zoning Commission of Mohave County to permit off-premises signs to be located in viable commercial areas and to discourage the rezoning of lots and parcels for the sole purpose of installing off-premises signs. It is also understood that signs displaying noncommercial messages considered protected free speech shall not require placement in commercial areas as the intent of their installation shall be for the purpose of increased opportunities for public communication.

2. Required Special Use Permit and state approval. Sign locations for off-premises signs shall be allowed only with an approved Special Use Permit. For off-premises signs fronting State Highways (93, 68, 66, 95, Interstate 15 and Interstate 40), approval of sign locations by the Arizona Department of Transportation is required after the issuance of the Special Use Permit and prior to sign permit approval by the County.

3. Required zoning classifications. Off-premises signs shall be permitted only on lots and parcels properly zoned C-2H (Highway Commercial), C-M (Commercial Manufacturing), C-MO (Commercial Manufacturing/Open Lot Storage), M-1 (Light Manufacturing) M-2 (General Manufacturing), and M-X (Heavy Manufacturing). In addition, off-premises signs shall be permitted on lots or parcels properly zoned C-2 (General Commercial) along State Highways (93, 66, 95, 68, Interstate 40 and Interstate 15) unless the area has been designated as a sign free area as per Section 42.K.4.f of these Regulations. In the event that a lot or parcel fronts on more than one (1) public right-of-way, only one (1) off-premises sign shall be allowed on either street frontage.

4. Standards and criteria for off-premises signs. Off-premises signs proposed for installation shall conform with the standards and criteria set forth in the following:

   a. Sign area. In all cases, off-premises signs shall have a maximum sign area of two hundred fifty (250) square feet except on Highway 93, Interstate 15 and Interstate 40 and certain arterials where the Board of Supervisors designates a more restrictive maximum sign area. Off-premises signs with a total area not to exceed six hundred seventy-two (672) square feet or 14' x 48' may be allowed on Interstate 40, Interstate 15 and Highway 93, unless the Board of Supervisors has designated the area as a sign-free area as per Section 42.K.4.f. If a sign has two (2) sign faces, the total permitted sign area may not exceed twice the sign area permitted for one (1) sign face. If one (1) or more signs are combined into one (1) sign face, the maximum permitted sign area shall not exceed what is permitted for one (1) sign face in the specific location.

   b. Sign height. The maximum height for signs with a sign face measuring up to two hundred fifty (250) square feet is thirty-five (35) feet above the grade of the highway. The maximum height for signs with a sign face measuring up to six hundred seventy-two (672) square feet is forty-five (45) feet above the grade of the highway. The maximum sign height includes any portion of the sign structure, sign face, and any decorative embellishments attached to the sign structure.

   c. Setback and vertical clearance. The minimum setback of any portion of the sign area measuring up to two hundred fifty (250) square feet is ten (10) feet from the edge of the public right-of-way. These signs shall have a minimum eight (8) feet vertical clearance measured from the street grade of the nearest driving lane to the lowest line of the sign area. Except when a freestanding off-premises sign projects over a vehicular traffic area, such as driveway and parking lot aisles, the minimum vertical clearance shall be eighteen (18) feet. A minimum setback of any portion of the sign area or structure for 14' x 48' signs shall be twenty (20) feet from the edge of the public right-of-way. These signs shall have a minimum vertical clearance of eighteen (18) feet.

   d. Spacing. A minimum of five hundred (500) feet between off-premises signs facing the same traffic flow in the same street or freeway shall be required in all cases. At the intersection of two (2) streets, double-faced signs at right angles to and facing traffic at Street "A" may be situated closer than five hundred (500) feet to a similarly positioned sign across the street at right angle to and facing traffic on Street "B" (see Figure 3).

erected on the wall or roof of a building. The name of the maker, the date of erection, and the permit number shall be permanently affixed to each sign installation. Such information shall be clearly legible and located in a conspicuous place on each sign.

h. Maintenance. Every sign shall be maintained in a safe, presentable and good structural condition at all times, including the replacement of defective parts, repainting, cleaning and other acts necessary for the maintenance of the sign. Any sign or sign structure which is damaged or deteriorated to an extent that the replacement cost of repair equals fifty (50) percent or more of the replacement value of the sign if sound, shall either be rebuilt or replaced in conformance with the standards and requirements of these Regulations, or be removed all together. Any sign which is not maintained or replaced if damaged more than fifty (50) percent or more of the replacement value shall forfeit its Special Use Permit after thirty (30) days of written notice.

i. Sign removal. The Zoning Inspector shall cause the repair or removal of any sign that endangers the public safety, such as materially dangerous, electrically or structurally defective sign, or an abandoned sign. Should the Zoning Inspector determine that the sign or sign structure causes eminent danger to the public safety, contact shall be made with the owner to require immediate removal or correction.

j. Manual changeable copy signs are permitted.

k. Automatic changeable copy signs are permitted provided that no message on an electronic changeable copy sign shall blink, flash or simulate animation. Transition between messages is permitted but such transitions may only fade, scroll, or dissolve, and the transition shall not exceed a duration of two seconds. Messages displayed shall remain static for at least ten (10) seconds.

l. The intensity of the LED display shall not exceed the levels specified in the chart below:

Intensity Level (nits)		
Color	**Daytime**	**Nighttime**
Red Only	3,150	1,125
Green Only	6,300	2,250
Amber Only	4,690	1,675
Full Color	7,000	2,500

Prior to the issuance of a Sign Permit, the applicant shall provide a written certification from the sign manufacturer that the light intensity has been factory pre-set not to exceed the levels specified in the chart above, and the intensity level is protected from end-user manipulation by password-protected software or other method as deemed appropriate by the Director.